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ABSTRACT

This volume contains 32 articles and sample documents treating legal issues in higher education employment focusing on major issues arising in a non-unionized setting. The first of six sections contains seven articles on the employment relationship in general that touch on current legal trends in employee selection procedures, employment contracts, personnel policies, immigration law, the Family Medical Leave Act, health coverage for domestic partners, and overtime compensation liability. The next section, on accommodation issues arising from the Americans with Disabilities Act includes five papers that cover: (1) university counsel perspectives; (2) enforcement; (3) reasonable accommodation; (4) disabled students, staff, and faculty; and (5) employees with infectious diseases. Section 3 looks at issues of concern to faculty including academic freedom, performance evaluation issues, post-tenure faculty evaluation, and judicial review of tenure decisions. Section 4 presents six papers on managing employee conduct including such aspects as sexual harassment (liabilities and penalties, internal complaints and investigations, and performance), employee misconduct, and violence in the workplace. Section 5 addresses dispute resolution in four papers, one of which is a collection of five sample institutional grievance procedures. Section 6 contains six papers on concluding the employment relationship and covers wrongful termination, early retirement incentive plans, downsizing, and the Worker Adjustment and Retraining Notification Act. (Contains 37 references.) (JB)

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THE PUBLICATION SERIES

Employment Issues in Higher Education: A Legal Compendium

JEAN S. SAGAN AND
THOMAS P. REBEL, EDS.

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Employment Issues in Higher Education:
A Legal Compendium

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National Association of College and University Attorneys
1995

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Users of this publication are reminded that the information given here is general in nature and is not intended as legal advice. Legal counsel should be consulted concerning the legal effects and ramifications of specific actions, questions, and situations.

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FOREWORD

Employment law is one of the fastest growing fields in American jurisprudence today. In this time of diminishing resources and mushrooming regulation, it becomes more and more challenging for the collegiate administrator to operate an institution efficiently without running the risk of impinging upon the individual rights of the academy's employees. This compendium is designed to provide the administrator and attorney an overview of some of the major issues which arise in the course of balancing those competing interests in a non-unionized setting.

There are many more areas of potential exposure for the academic employer than these selected articles specifically address. Indeed, the employment relationship itself encompasses so many aspects of human interaction and regulatory responsibility that it would be impossible to cover the topic exhaustively in any single volume. In view of these space limitations, we have focused for the most part on articles relating directly to the higher education arena. In this volume, sexual harassment is considered in the context of managing employee conduct. We have not included a separate article on nondiscrimination *per se*, since that theme runs through most of these articles. We have, however, included a number of articles on accommodation of persons with disabilities because the recent implementation of the ADA has evoked renewed interest in this area.

Finally, it is important to point out that some of the articles in this compendium focus on particular state laws. While these can be helpful in addressing the different legal restrictions which may apply for the sates covered, institutions in other states should bear in mind that laws can differ significantly from one state to another. Consequently, the laws of the state where the institution operates should be reviewed to determine what differences exist from those in the article. Although we do not include specific citations to state law which may influence your interactions with faculty and staff, it is also important to keep in mind that state laws may give employees additional rights and that for public institutions, state open records, open meeting, or other laws might impose or exempt an employer from particular obligations.

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CURRENT LEGAL TRENDS IN EMPLOYEE SELECTION PROCEDURES[1]

I. INDIVIDUAL PRIVACY RIGHTS AND THEIR EFFECT ON THE HIRING PROCESS

A. Introduction

The tension between applicants' expectations of personal privacy and prospective employers' desire to have as much knowledge as possible about applicants has given rise to increasing debate in employment law literature and in the courts. Although public attention has focused most directly on pre-hiring drug and alcohol testing, there are a myriad of other privacy in hiring issues. The courts and legislatures across the country have constantly been fashioning the rules creating and defining the limits of employee privacy. Many individual privacy issues affecting hiring stem from the constitutional guarantees and common law test theories such as invasion of privacy. Increasingly, legislatures have entered the arena of applicant privacy rights by placing even greater restrictions on employers' abilities to test and question.

B. Drug And Alcohol Testing

Testing for drug and alcohol use among prospective employees developed out of employers' concerns regarding drug use on the job and the job-related effects of off-duty use. Public employees enjoy far greater protection from drug and alcohol testing than do applicants for private sector positions. Generally, private sector applicants must base any claim upon an invasion of privacy, while public sector applicants may also found their complaints upon state and federal constitutions.

1. Public Employees

Traditionally, the United States Supreme Court has recognized three governmental interests that might be sufficiently compelling to justify mandatory testing of any employee or prospective employee without individual suspicion: (1) government interest in maintaining integrity of the work force; (2) public safety; and (3) protection of "truly sensitive information." See Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989); Treasury Employees Union v. von Raab, 489 U.S. 656 (1989).

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[1] Mr. James, Mr. Bulger and Mr. Gomez wish to thank the following individuals for their assistance in preparing these materials: Brian Paton, Mary Yuen-Ng, and Valeri Furst, associates, Labor and Employment Law Practice Area, Squire, Sanders & Dempsey; J. Steven Justice, Trish Lantzy and Sunil Hariani, summer associates, Squire, Sanders & Dempsey.

2. Private Employees

A growing number of state statutes explicitly regulate drug testing of applicants. Many states, including Connecticut, Hawaii, Iowa, Minnesota, Mississippi, Montana, North Carolina, Utah and Vermont have enacted laws which regulate drug testing of both current employees and applicants. Laws range in restrictiveness from merely requiring employers to adopt a written testing policy and provide the employee/applicant written notice of the employment action to be taken and notice that the individual may request a verification test (Maryland) to prohibiting testing of applicants unless they have been offered a conditional offer of employment (Minnesota).

Also, there is an emerging body of law which would treat those who test positive for drugs as disabled or handicapped. In Doe v. Roe, 539 N.Y.S.2d 876 (Sup. 1989), aff'd, 553 N.Y.S.2d 364 (1990), for example, an employer rejected an applicant after he tested positive for opiates. The plaintiff applicant successfully stated a cause of action against the employer by claiming that the employer unlawfully subjected the employee to a urinalysis test without demonstrating that the test was job related. The applicant further claimed that the employer refused to hire the applicant on the basis of the test without evaluating the applicant's capacity to perform in the position sought. The applicant argued that the employer perceived the applicant as a drug abuser and did not hire the applicant on that basis. Drug abusers are characterized as disabled under New York law, and the law forbids discrimination against disabled persons who are able to perform their jobs. The court noted that New York law obliges employers to evaluate job applicants on their merits and allows refusal of applicants only on the basis of their inability to perform the duties of the job in question.

Current users of illegal drugs are not protected under the Americans with Disabilities Act and testing of them and denial of employment to them is not prohibited. However, persons addicted to drugs, but who are no longer using illegal drugs and are receiving treatment or who have been successfully rehabilitated, are protected by the ADA from discrimination on the basis of past drug addiction.

On the other hand, one who currently uses alcohol is not automatically denied ADA protection simply because of the alcohol use. An alcoholic is a person with a disability under the ADA and may be entitled to consideration of accommodation if he or she is qualified to perform the essential functions of a job. However, an employer may deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct to the extent that he or she is not qualified.

In the drug testing arena, it is clear that applicants have fewer rights than employees. Even in California, employers may give prospective employees a drug and alcohol urinalysis test as long as the test is "reasonable." Wilkinson v. Times Corp., 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194 (1989).

In Ohio, an employer may condition an offer of permanent employment upon successful completion of a drug test. Thus, where the prospective employee failed a drug test, and was therefore not offered employment, summary judgment was appropriate upon her invasion of privacy claim. Groves v. Goodyear Tire & Rubber Co., 70 Ohio App. 3d 656, 591 N.E.2d 875 (1991).

In a similar case, an employer which revoked a conditional job offer after an applicant failed a drug test did not breach any employment contract with him. A signed pre-employment statement constituted an at-will disclaimer and conditioned employment on a negative test result. The job offer had been revoked prior to acceptance. Jevic v. Coca Cola Bottling Co., 5 IER Cases (BNA) 765 (D.N.J. 1990).

As with any other type of drug or alcohol testing, applicants should be provided some privacy while the sample is taken, employers should use testing methods with recognized accuracy, should ensure a chain of custody, and should provide for verification by a reliable method.

C. Hair, Saliva And Genetic Testing

Employer genetic testing of applicants is specifically prohibited by several state statutes, including Wisconsin, Rhode Island, and Iowa. In all other states, an employer's ability to conduct genetic testing appears to be severely restricted or flatly prohibited by the Americans with Disabilities Act as an "employment test or other selection criteria that screens out or tends to screen out an individual with a disability."

Some employers have explored testing applicants' and employees' hair and saliva as an alternate means of testing for drugs. Portions of an individual's hair follicle may be tested via the radioimmunoassay hair-screen test (RIAH). One federal court, however, has denounced the test as "intrusive and unreliable." United States v. Foote, 898 f.2d 659, 665 (8th Cir. 1990). Under Nevada law, however, as long as the RIAH is not the sole basis for an employment decision, but rather is confirmed by a gas chromatography/mass spectrometry test, an employee or applicant's privacy has not been invaded. Koch v. Harrah's Club, 5 IER Cases (BNA) 1275 (D.Nev. 1990). Otherwise, hair and saliva testing will probably be subject to at least the same restrictions as urine tests.

D. HIV And AIDS Testing

Infection with the human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS) are disabilities under the Americans with Disabilities Act. See EEOC Technical Assistance Manual II-3. AIDS has also been classified as a protected disability under Section 504 of the 1973 Vocational Rehabilitation Act.

As such, an employer may not make any pre-employment inquiries about AIDS or HIV, the stage of the disease or the contraction of the disease. Such inquiries are prohibited on an application form, in job interviews, or through background or reference checks. Further, an employer may not test an applicant to determine whether the applicant has AIDS or HIV. Employers may not make any employment-related decision based upon base suspicion or belief the applicant has HIV or AIDS.

However, an employer may ask a job applicant questions about ability to perform specific job functions, tasks, or duties as long as these questions are not phrased in terms of a disability.

E. Polygraph Testing

1. Federal Law: Employee Polygraph Protection Act of 1988

The Employee Polygraph Protection Act of 1988 prohibits most private employers from using lie detector tests to screen job applicants. The law also:

a. permits private security firms and drug companies to use polygraph tests with applicants and employees;

b. exempts federal, state, and local governments and allows the federal government to test private consultants and experts;

c. authorizes civil suits by the Secretary of Labor (DOL may seek civil fines of up to $10,000), employees and job applicants and gives federal courts power to award legal and equitable relief; and

d. does not pre-empt any state or local law or collective bargaining agreement that prohibits lie-detector tests or that is more restrictive than federal law.

Employers may not escape liability for EPPA violations merely by hiring an independent contractor to conduct polygraph examinations. Indeed, both the polygraph examiner and the employer may be held independently liable. However, employers may seek indemnification from polygraph examiners if the examiner represents to the employer which employees can lawfully be polygraphed and that it would conduct the examination in compliance with EPPA. Rubin v. Tourneau, Inc., 7 IER Cases (BNA) 993 (S.D.N.Y. 1992).

2. State Laws

Most states and the District of Columbia regulate the use of lie detectors. This coverage varies in defining the test and what it measures. For example, New Jersey refers to "lie detectors," Maine refers to "polygraph examinations," and New York regulates "psychological stress evaluators." All are honesty evaluators which measure physiological reaction to questions, changes in voice and other changes tending to show the honesty of the person being evaluated. See generally Mass. Gen. Laws Ann. ch. 149, § 19B (1989); R.I. Stat. § 28-6.1-1 (1986); Wis. Stat. Ann. § 111.37(1)(a),(b) (West Supp. 1986).

State laws vary with regard to the type of regulation and how it is enforced. For example, some state regulation occurs in the form of licensing requirements on those who administer the tests, whereas other states ban all use in private sector employment, and still others prohibit employers from demanding, requiring, or requesting that employees take the tests. Some states that ban the use in private sector employment make exceptions for law enforcement employees and employees who have access to controlled substances. Statutory penalties are prescribed for administering unlawful lie detector tests. Exceptions are often made for public employees or those working in law enforcement.

3. Constitutionality

California's polygraph act banned polygraph testing of private employees but allowed testing of all public employees except "public safety officers." The California Supreme Court held that the law denied equal protection of the laws to the employees and intruded on the zone of privacy created under the state constitution. Long Beach Employees Assn. v. Long Beach, 719 P.2d 660 (Cal. 1986). Other states have found this right of privacy "implied" where there is no express guarantee in the state constitution. Texas State Employees Union v. Texas Dept. of Mental Health, 746 S.W.2d 203 (Tex. 1987).

The Ninth Circuit held that a state invaded the right to privacy and association where a polygraph examination was conducted in which there were no clear boundaries or standards, even where the inquiry was based on a legitimate state interest. Thorne v. El Segundo, 726 F.2d 459 (9th Cir. 1983), cert. denied, 469 U.S. 979 (1984).

Polygraph testing can infringe on the right to due process and equal protection. However, to show that these rights were violated, the plaintiff must show that he/she was deprived of a property or liberty interest. In a Third Circuit case where applicants for jobs in city police and correction departments initiated a constitutional challenge to mandatory polygraph testing, the court found no such interests involved. In addition, the Pennsylvania law was sustained because of the government's compelling interest in hiring qualified applicants as law enforcement officers. Even though the testing has not been established scientifically, this does not demonstrate that its use in selecting law enforcement officers is irrational. Anderson v. Philadelphia, 845 F.2d 1216 (3d Cir. 1988).

F. Honesty Testing

Employers are increasingly using honesty tests in an attempt to eliminate or reduce dishonesty in the workplace. Honesty tests are designed to identify individuals who have relatively high propensities to steal money or property or who are likely to engage in otherwise counterproductive behavior. The Employee Polygraph Protection Act does not apply to paper and pencil honesty tests.

Honesty tests typically inquire into whether the applicant has ever committed a dishonest act, ask about opinions toward illegal and disapproved behavior and request reactions to hypothetical situations. Employers use honesty tests to stop or slow employee theft and to avoid liability for negligent hiring. Employee groups question the reliability of the tests, claim the tests frequently invade protected privacy interests and are subject to abuse.

1. State Limitations on Honesty Testing

Several states have legislatively addressed honesty testing:

a. Massachusetts expressly prohibits an employer from requesting an applicant to take a written examination that renders a diagnostic interpretation of honesty. Mass. Gen. Laws Ann. ch. 149 § 19B;

b. Minnesota prescribes that "no employer or agent thereof . . . shall require a polygraph, voice stress analysis, or any test purporting to test the honesty of any employee or prospective employee." Minn. Stat. § 181.75;

c. Rhode Island prohibits employers from using honesty tests as the "primary basis" for a hiring decision. R.I. Gen. Laws §§ 28-6.1-1 to 28-6.2-4;

d. Wisconsin also prohibits the administration of any honesty test to a prospective employee. Wis. Stat. Ann. § 111.37.

2. Employer Use of Honesty Tests

To avoid claims of discrimination, employers should use only those honesty tests which have been professionally developed and validated for the employer's jobs in accordance with applicable laws and guidelines. Use each test only for the purpose for which it was designed. Remember that honesty tests are subject to the same restrictions placed upon any other pre-employment test by the Americans with Disabilities Act. Thus, honesty tests may not be used to inquire as to an individual's health or other medical condition.

Employers would be well-advised to have applicants sign an informed consent agreement to take the honesty test. Only qualified personnel should administer the tests, and all tests should be administered under the same conditions. Do not disseminate test data, and avoid entering test scores into any automated corporate data bases if possible.

3. Other Psychological or Personality Tests

Other tests purport to assess a variety of attitudes and personality traits, many of which have been imported from psychological clinical arenas. Such tests have been challenged largely under discrimination laws. If there is an adverse effect on a protected class, the test must be validated. See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

Recently, a federal jury in Maine awarded $960,000 to a police officer who was suspended without pay for refusing to take a penile plesythmograph, a device used to measure his sexual arousal patterns while being shown films of sexual activity. The officer had been publicly accused of child sexual abuse in a trial against others, but no charges had been filed against him. The officer based his claims on a denial of due process and the Fourth Amendment right to be free from unreasonable searches and seizures. Harrington v. Cole, 89-CV-207 (D.Me. June 17, 1993).

Additionally, a California employer was recently hit with a $2 million settlement arising from its use of a standardized psychological test. The applicants complained the test asked whether they had ever indulged in unusual sexual practices, whether they were attracted to members of the same sex, and whether they had strong religious beliefs. BNA Daily Labor Reports No. 132, July 13, 1993 at AA-1. A California appellate court had ruled in 1991 that the test violated the state's constitution and labor laws, Soroka v. Dayton Hudson

Corp., 7 Cal. App. 4th 203, 1 Cal. Rptr. 2d 77, and the California Supreme Court agreed in 1992 to review the case. 882 P.2d 1327, 4 Cal. Rptr. 180.

G. Consumer and Character Credit Reports

1. Federal Law

The Federal Fair Credit Reporting Act of 1970, 15 U.S.C. § 1861 et seq., regulates the use of credit information and "investigative consumer reports" for employment purposes. An applicant must be notified in writing if he or she has been denied a job because of a negative consumer report. An applicant must likewise be informed if an "investigative consumer report" is to be used in evaluating the applicant.

A "consumer report" is defined as a communication by a consumer reporting agency regarding creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living. "An investigative consumer report" is defined as a report containing information about a consumer's character, general reputation, personal characteristics or mode of living obtained through interviews with people who know or have knowledge concerning a consumer.

In order to request an investigative consumer report, the employer must notify the applicant at least three days before the employer requests the report. Additionally, the reports may not be used to evaluate applicants for positions for which they specifically applied. Moreover, the parameters of consumer reports are limited. Among other items, they may not include bankruptcy filings, suits and judgments more than seven years old, records of arrests and indictments or convictions more than seven years ago. If employment is denied on the basis of the report in whole or in part, the employer must inform the applicant of the report and provide the name and address of the agency that prepared the report.

2. State Laws

Several states have enacted laws restricting employers' ability to obtain consumer or character reports.

1. With some variation, Arizona (Ariz. Rev. Stat. Ann. §§ 44-1691 to 44-1693), California (Cal. Civ. Code §§ 1786-1786.56), Maine (Me. Rev. Stat. Ann. tit. 10, §§ 1312, 1314, 1320, et seq.), Massachusetts (Mass. Gen. Laws ch. 93, § 50, et seq.), New Hampshire (N.H. Rev. Stat. Ann. § 359-B), New Mexico (N.M. Stat. Ann. §§ 56-3-1, et seq.), and New York (N.Y. Gen. Bus. Law § 380) requires employers to reveal, upon written request, the name of the consumer

reporting agency which prepared a report upon which an employer based a disadvantageous employment decision.

II. EMPLOYEE RECRUITING

Employers utilize various recruiting methods, including (1) job opportunity advertising; (2) walk-in application; (3) word-of-mouth recruitment; and (4) employment agencies. Each method carries with it a separate set of liabilities which, with some forethought, can be avoided.

A. Advertising

Title VII (42 U.S.C. §2000e-3(b)), the ADEA (29 U.S.C. §623(e) and the ADA (42 U.S.C. §12112) all prohibit placing an advertisement which indicates a preference based upon a protected category, except where there exists a bona fide occupational qualification. Thus, "trigger words" in advertisements such as "young," "age 25 to 35," "boy," "girl," "physically strong," and of course "Men Wanted" or "Opportunity for Career Woman" should be avoided. Even more subtle terms such as "college student" or "recent college graduate," which can deter older persons from applying for a position of employment, should not be used. Likewise, phrases like "40 to 50," "age over 65," "retired persons," or "supplement your pension" discriminate against others within the protected age group and, therefore, are generally prohibited. 29 C.F.R. §1625.4(a). However, courts have held that it is not the "trigger words" alone that render an advertisement unlawful, but the context in which the trigger words appear. *See Hodgson v. Approved Personnel Service Inc.*, 529 F.2d 760 (4th Cir. 1975).

The most frequent violation of this prohibition involves advertisements indicating a preference for sex. For instance, a company violates Title VII if it advertises a position of employment by placing, or permitting to be placed, an advertisement in a sex-segregated format, such as placing ads for nonmanagement positions in female help-wanted columns and ads for management positions in male help-wanted columns, even if this is due to a sincere belief that women would not be interested in the jobs listed for males. *See Capaci v. Katz & Besthoff*, 711 F.2d 647 (5th Cir. 1983), *reh'g denied*, 702 F.2d 1291 (1983), *cert. denied*, 466 U.S. 927 (1984).

In addition, it is unlawful to use gender specific (or "sex-referent") terms such as "stewardesses" when advertising a position of employment. *See Hailes v. United Air Lines*, 464 F.2d 1006 (5th Cir. 1972); EEOC Comp. Man. §632.2(i).

Finally, under the ADA, employers must scrutinize any job qualification listed in an advertisement to ensure that they do not indicate a bias against persons protected by the ADA. Specifically, any job duties or requirements contained in a job advertisement, which an employer indicates an applicant must possess or be able to perform, can later be considered in determining the essential functions of a job. For instance, the EEOC Technical Assistance Manual provides that if a company advertises a position for a "floating" supervisor to substitute when regular supervisors on the day, night, and graveyard shifts are absent, the ability to work any time of day is an essential function of the job since the only reason the position exists is to have someone who is able to work these three shifts. See EEOC Technical Assistance Manual, Ch. II, §2.3(a).

Furthermore, the Manual provides that an employer should include the essential functions of a job in an advertisement, as to insure that only qualified individuals apply. Id. at Ch. V, §5.2. Obviously, these suggestions by the EEOC indicate that an advertisement can later be used to determine the essential functions of a job. Therefore, when an employer advertises a job position, the advertisement must accurately state the requirements of the job, as it can later be used in determining the job's essential functions.

B. Walk-In Applications

Under all discrimination statutes, all persons seeking to complete an employment application must be given an equal opportunity to do so. Under the ADA, this may mean placing applications in a location that is more accessible and even providing assistance in filling out the application. Proper application procedures under the ADA are treated more fully elsewhere in these materials.

C. Word Of Mouth Recruiting

1. Overview

Companies recognize that recruiting can be expensive. They also recognize that one of the least expensive methods is word of mouth recruitment. Because they know of the company through their friends and relatives, word of mouth recruits are more likely than other applicants to understand ahead of time what it is like to work at the company and what is expected of them. Word of mouth recruitment is also a useful way of screening applicants, because a current employee may put his credibility on the line in referring a new hire and presumably will not recommend a poor employee.

This employee selection method has generated controversy because some believe it is inherently discriminatory. Early cases in the 1970s, which alleged racial discrimination, resulted in judicial tests for determining whether a company's word of mouth recruitment policy was justified. *See* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Clark v. American Marine Corp., D.C., 304 F. Supp. 603 (E.D.La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971) (recognizing the need to counteract the discriminatory impact of word of mouth hiring); *see also* Gresham v. Chambers, 501 F.2d 687 (2d Cir. 1974) (black faculty member brought civil rights action to try to prevent appointment of white associate dean) (holding that where a pattern of past discrimination appears, recruitment procedures that might otherwise be classified as neutral would no longer be accepted as non-discriminatory; however, absent such a showing, word of mouth recruiting would not be barred); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973) (where fewer than 10 percent of the company's employees were black despite the existence of a large pool of black applicants and where friends of current (mostly white) employees received the first notice of job openings, court held the company's recruitment practices operated as a "built-in headwind" against blacks and were not justified by business necessity).

Plaintiffs have challenged word of mouth recruitment under two theories: disparate impact and disparate treatment. As Judge Posner recently explained,[2] if word of mouth recruiting is deemed to be an employment practice, it is subject to review for disparate impact, and the advantages of the practice must be balanced against its possibly discriminatory effect when the employer's current work force is already skewed. Under disparate treatment analysis, however, the question is whether word of mouth recruitment gives rise to an inference of intentional discrimination.

2. Disparate Impact

There were a number of sex and race discrimination challenges to word of mouth recruitment in the 1980s under a disparate impact theory. For example, in Catlett v. Missouri Highway and Transp. Comm'n, 589 F. Supp. 929 (W.D. Mo. 1983), four female applicants for the position of maintenanceman with the Missouri Highway and Transportation Commission filed a class action sex discrimination suit against the Commission. The Commission had purposefully failed to change its word of mouth recruiting policy that generated a disproportionately low number of female applicants. Id. at 934. Nearly all the hiring of maintenancemen resulted from word of mouth recruiting and although the Highway Commission was aware that few women were applying, the Commission made no effort to publicize job vacancies. Id. at 946-47. The court stated that it was "not surprising that this type of recruitment produces few female applicants, as it should be expected that the male employees . . . usually would inform only their male relatives and friends of the maintenancemen vacancies." Id. at 947. The court concluded the women had established that the Commission's word of mouth recruiting constituted a pattern and practice of employment discrimination resulting in an adverse impact on the class. Id.

Similarly, in Van v. Plant and Field Serv. Corp., 672 F. Supp. 1306, 1308 (C.D. Cal. 1987), the court held that relying on word of mouth referrals from current employees and hiring walk-in applicants when the only applicants likely to walk in are non-minorities amounts to unlawful discrimination.

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[2] *See* Equal Employment Opportunity Comm'n v. Consol. Serv. Sys., 989 F.2d 233, 236 (7th Cir. 1993), discussed *infra*.

a. Burdens of Proof

Prior to the Civil Rights Act of 1991, in order to prevail on a disparate impact claim, the plaintiff had to first make out a prima facie case of discrimination. The burden then shifted to the employer, who had to articulate legitimate, nondiscriminatory reasons for the policy. The plaintiff then had to show that the reasons were pretextual. *See* Equal Employment Opportunity Comm'n v. Lady Baltimore Foods, Inc., 643 F. Supp. 406-07 (D. Kansas 1986) (plaintiff must show that the employer's use of word of mouth recruitment is pervasive and that it rises to the level of unlawfulness). The Act codified the burden of proof in disparate impact cases and placed a heavier burden on employers who must now show that the challenged practice is job related for the position in question and consistent with business necessity. 42 U.S.C. § 2000e2(k)(1)(A)(i). As yet, however, there have been no word of mouth recruitment cases brought under a disparate impact theory applying the Act.

It is possible for an employer to demonstrate that it has legitimate business reasons for its word of mouth recruitment policy. For example, in Equal Employment Opportunity Comm'n v. O & G Spring and Wire Forms Specialty Co., 732 F. Supp. 72 (N.D. Ill. 1990), an employer established legitimate business reasons for recruiting workers for unskilled positions by word of mouth. Despite the disparate adverse impact on blacks, the company showed that the practice provided it with a ready source of employees who would be willing to work at low pay and under poor conditions. Nevertheless, statistical evidence indicated that the employer engaged in a pattern and practice of disparate treatment of blacks in its hiring of walk-ins off the street. Id. The company had established several business justifications for its recruitment procedure: it cost no money; it provided the company a pool of people who would be willing to work under poor conditions for low salaries; and it provided people with technical training, thereby creating a pool of employees who could be promoted from within to more skilled positions without the necessity of a formal training program. Id. at 73.

The court held that the EEOC did not carry its burden of persuasion on its claim that the company's word of mouth recruitment practices did not have legitimate business purposes. Although the EEOC's disparate impact claim failed, the court found that there was disparate treatment of walk-in hires because the company had engaged in a pattern and practice of discriminatory treatment of blacks. Id. at 74-75. *See also* Equal Employment Opportunity Comm'n v. O & G Spring and Wire Forms Specialty Co., 790 F. Supp. 776 (N.D. Ill. 1992) (holding that the company's word of mouth recruitment practices perpetuated the discriminatory distribution of races in the company's work force and resulted in a "black hiring shortfall" because, although approximately one-third of the hires were recruited by word of mouth, recruitment did not extend to blacks as expected since the company had not hired black walk-in applicants).

b. Recent Cases

Recent challenges to word of mouth recruitment generally have failed. Plaintiffs who have prevailed in the trial court have been reversed on appeal. For example, in *Equal Employment Opportunity Comm'n v. Chicago Miniature Lamp Works*, 622 F. Supp. 1281 (N.D. Ill. 1985), *rev'd*, 947 F.2d 292 (7th Cir. 1991), a black employee and the EEOC sued an employer, alleging race-based discrimination against blacks as a class and against the black employee individually. The court held that the employer's hiring pattern and work force composition demonstrated racial bias in both recruitment and hiring because of the employer's heavy use of word of mouth recruiting, which excluded blacks from the company's job information network and resulted in the gross underrepresentation of blacks in the applicant pool and work force. *Id.* at 1288. The court used an extensive statistical comparison in reaching its decision. *Id.* at 1286-1305. The court also noted that word of mouth hiring, if relied on extensively by an employer, is a suspect employment practice because it can be expected to perpetuate existing imbalances.

The Seventh Circuit reversed. *Equal Employment Opportunity Comm'n v. Chicago Miniature Lamp Works*, 947 F.2d. 292 (7th Circuit 1991). The court distinguished among various types of word of mouth recruitment, noting that the EEOC did not allege that the company "affirmatively engaged in word of mouth recruitment of the kind where it told or encouraged its employees to refer applicants for entry level jobs." *Id.* at 305. Rather, the company "passively waited for applicants who typically learned of the opportunities from current . . . employees." *Id.* The court held that while reliance on word of mouth to obtain applicants for jobs does not insulate an employer from a finding of disparate treatment of minorities, "for the purposes of disparate impact, a more affirmative act by the employer must be shown in order to establish causation." *Id.* at 305. The court concluded that the company's entry level hiring practices were straightforward, simple and effective and that the statistical model ignored key factors, such as commuting distance and language fluency. *Id.* The court held that the district court erred in considering passive reliance on employee word of mouth recruiting as a particular employment practice for purposes of determining disparate impact, since the recruiting was undertaken solely by employees. *Id.*

3. Disparate Treatment

The most recent word of mouth recruitment case, a disparate treatment challenge, illustrates the difficulty for plaintiffs of prevailing under a standard of intentional discrimination. In Equal Employment Opportunity Comm'n v. Consol. Serv. Sys., 989 F.2d 233 (7th Cir. 1993), a small janitorial service owned and operated by a Korean immigrant relied almost exclusively on word of mouth recruiting for its applicants. Despite the fact that 73 percent of the applicants and 81 percent of the hires were Korean, the court held that there was no direct evidence of discrimination, and no inference of intentional discrimination could be drawn in this case. Id. at 235-36. The court noted that when an employer is a member of an ethnic community whose members tend to work and socialize with each other rather than with people in the larger community, it is "inevitable that when the network is used for job recruitment the recruits will be drawn disproportionately from the community." Id. at 235. The court held that "if the most efficient method of hiring, adopted because it is the most efficient . . . , just happens to produce a work force whose racial or religious or ethnic or national origin or gender composition pleases the employer, this is not intentional discrimination." Id. at 236.

The Seventh Circuit has spoken emphatically on the subject:

> [W]ord of mouth recruiting does not compel an inference of intentional discrimination . . . where . . . it is clearly . . . the cheapest and most efficient method of recruitment, notwithstanding its discriminatory impact. . . . It is not discrimination, and it is certainly not active discrimination, for an employer to sit back and wait for people willing to work for low wages to apply to him. The fact that they are ethnically or racially uniform does not impose upon him a duty to spend money advertising in the help-wanted columns.

Id. at 236-37.

In essence, whether a company's word of mouth recruitment policy can withstand a discrimination challenge will depend upon the composition of the company's current work force, other recruitment methods used by the company, its particular word of mouth practices, and reasons for using word of mouth recruitment. Employers who wish to use word of mouth recruiting should withstand discrimination challenges based on their recruitment practices (1) under a disparate impact theory, if their hiring patterns and work force composition does not demonstrate bias; and (2) under a disparate treatment theory, if they can demonstrate a lack of intentional discrimination and legitimate business reasons for relying on word of mouth.

D. Employment Agencies

Any action taken by an employment agency on behalf of an employer may be imputed to the employer, and the employer may therefore be held liable for the action. Employers should thus choose their agencies wisely and monitor them for compliance with employment laws.

III. RESUME/APPLICATION FRAUD AND TRUTH IN HIRING

Courts have adopted views of varying harshness towards plaintiffs who lie or exaggerate their qualifications in resumes or application forms.

In the most dramatic cases, plaintiffs in later discrimination lawsuits are barred completely from recovery, where it turned out that they had lied during the application process. Other courts have struggled with the proper standards and have adopted a more Solomonic approach: limiting but not denying recovery.

This area has now generated sufficient interest that the U.S. Supreme Court has granted a certiorari petition. Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302 (6th Cir. 1992), cert. granted, 61 U.S.L.W. 3851 (U.S. June 21, 1993) (No. 92-1214).

In Milligan-Jensen, the Sixth Circuit entered judgment against the plaintiff in a sex discrimination and retaliation claim. The plaintiff, a university security officer, had filed a lawsuit; in preparation for trial, the university discovered that the officer had not disclosed a prior DUI conviction on her application. The District Court found that the university would have fired the ex-employee had it learned of the application falsification. The Sixth Circuit wrote:

> "since the trial court found as a fact that falsification of the employment application, if discovered during her employment, would have resulted in [the officer's] termination, it becomes irrelevant whether or not she was discriminated against, and we need not discuss the remaining issues raised in the briefs . . . . [T]his case must be remanded to the trial court with directions to vacate the judgment for [the officer] and enter judgment for [the university]."

On June 21, 1993, the U.S. Supreme Court granted certiorari to hear the officer's arguments; the Court's ruling may resolve the disharmony among the Circuits described below.

A. Basic Doctrine

The case of Summers v. State Farm Mutual, 864 F.2d 700 (10th Cir. 1988) began the recent interest in this area. Plaintiff Summers was terminated in 1982 based on falsification of company records and filed suit claiming age and religion discrimination. In preparation for trial four years later, the company discovered an additional 150 falsifications by Summers, and sought to admit this additional evidence in a summary judgment motion. Summers sought to exclude this "after-acquired" evidence, on the theory that evidence discovered after the termination should not be admissible as irrelevant, because the employer had not relied on it in making the termination decision.

The Tenth Circuit stated:

> "To argue, as Summers does, that this after-acquired evidence should be ignored is utterly unrealistic. The present case is akin to the hypothetical wherein a company doctor is fired because of his age . . . and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a 'doctor.' In our view, the masquerading doctor would be entitled to no relief, and Summers is in no better position." (Id. at 708).

The court concluded that summary judgment against Summers was properly granted.

This result is also consistent with standard agency law doctrines. Comment (e) to section 409(1) of the Restatement (Second) of Agency states:

> "If a principal has cause for the discharge of an agent and discharges him, the fact that the principal is not at the time aware that he has cause for discharge is immaterial."

A typical case applying Summers is Bonger v. American Water Works, 789 F. Supp. 1102 (D. Colo. 1992). A terminated employee was barred from relief where she stated on her resume that she had a college degree, when in fact, as the company discovered after her termination, she did not have a degree. The court concluded, based on the Summers case, that the employee would be denied relief, and summary judgment was granted. The court stated:

> "To prevail under Summers, an employer must show that it would have discharged the employee had it known of the misconduct before or at the time of termination. This requirement is intended to prevent an employer, after being charged with unlawful discrimination, from reviewing an employee's file to discover minor or technical infraction for use in a Summers defense." (Id. at 1105-06).

Other cases reaching the same or similar results include: Johnson v. Honeywell Information Systems, Inc., 955 F.2d 409 (6th Cir. 1992) (application fraud bars recovery); Washington v. Lake County, Ill., 969 F.2d 250 (7th Cir. 1992) (application fraud bars recovery if "would have been" fired); Dotson v. United States Postal Service, 977 F.2d 976 (6th Cir. 1992); Baab v. Amer. Services Corp., 811 F. Supp. 1246 (N.D. Ohio 1993); Churchman v. Pinkerton's Inc., 756 F. Supp. 515 (D. Kan. 1991); O'Driscoll v. Hercules, Inc., 745 F. Supp. 656 (D. Utah 1990); Benson v. Quanex Corp., 58 FEP Cases 743 (E.D. Mich. 1992); Greene v. Standard Register Co., 60 FEP Cases 1151 (W.D. Mich. 1992); Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991 (D. Kan. 1989); Kravitt v. Delta Air Lines, 60 FEP Cases 994 (E.D.N.Y. 1992); Leahy v. Federal Exp. Corp., 685 F. Supp. 127 (E.D. Va. 1988); McKennon v. Nashville Banner Publishing Co., 797 F. Supp. 604 (M. D. Tenn. 1992); O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466 (D. Ariz. 1992) (after-acquired evidence of misconduct bars recovery), appeals docketed, Nos. 92-15625 and 92-16512 (9th Cir. Apr. 17, 1992 and Aug. 27, 1992).

B. Reaction to Basic Doctrine

This doctrine has lately had some scaling back as a few courts have tried to ameliorate the sometimes harsh results. In Wallace v. Dunn Construction Co., 59 FEP Cases 997 (11th Cir. 1992), the court concluded that a terminated employee's lie on her application form about a prior drug conviction would not serve as a defense to liability -- rather, the court concluded, the application fraud would affect "front pay" and other relief only.

First, the Eleventh Circuit cited Summers for the proposition that:

> "an employer may avoid all liability for a discharge based solely on unlawful motives by proving that it would have discharged the plaintiff absent any unlawful motives if it had possessed full knowledge of the circumstances existing at the time of the discharge." (Id. at 1000; emphasis in original).

However, after a review of the Supreme Court's "mixed motive" opinion in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), the Wallace court concluded that resume fraud would not "provide an affirmative defense to Title VII liability." (Id. at 1002).

Instead, however, "after-acquired evidence is relevant to the relief due a successful Title VII plaintiff" (id. at 1003), and therefore "it would be inappropriate for a court to order reinstatement or front play." (Id.).

The Court took an inventive approach to the issue of backpay, stating:

> "the boundary between the competing concerns shifts such that [plaintiff's] backpay period should not terminate prematurely unless [defendant] proves that it would have discovered the after-acquired evidence prior to what would otherwise be the end of the backpay period in the absence of the allegedly unlawful acts and this litigation." (Id.)

The court also noted that plaintiff would be entitled to declaratory relief, and possibly to nominal damages. (Id. at 1004).

On a more practical level, the court concluded that attorney's fees would be available, but that the after-acquired evidence "may decrease" the fees awarded from "traditional" levels. (Id.).

The Summers rationale was also scaled back in Reed v. Amax Coal Co., 971 F.2d 1295 (7th Cir. 1992), in which the Seventh Circuit held that it was not sufficient for the company to show that it could have fired the employee based on resume fraud. Instead, the employer must prove that it would have fired the employee -- for example, the company must provide evidence that other employees were in fact fired for the same offense.

The Seventh Circuit's discomfort with Summers was also apparent in Kristufek v. Hussman Foodservice Co., 985 F.2d 364 (7th Cir. 1993). The court held that Kristufek was not barred from recovery because his employer's policy stated that a false application "may" lead, rather than "will" lead, to an employee's firing. (Id. at 369). The court also ruled that Kristufek was entitled to recover back pay, but that his recovery should be diminished by the amount of damages and opponent's attorneys' fees for time after the discovery of the false application. (Id. at 371).

C. Practical Effect on Employers and Employees

Based on these most recent decisions, employers should be prepared to prove that they have indeed terminated employers when material resume or application fraud is discovered.

The standard warnings on the application form and handouts may need to be updated in light of the Kristufek distinction, supra. A statement to the effect that misrepresentations during the application process "will, if material, lead to termination" may now be needed.

Plaintiffs' attorneys may now need to obtain their client's resume or application form before filing suit, and will need to worry about the timing of discovery potentially affecting the back pay award.

D. Truth-in-Hiring Cases

The theory behind resume falsification defenses has recently been conversely applied: Employees are recovering damages from employers which fraudulently induced them to accept positions. In order to successfully bring such a tort action, the employee must establish the employer intentionally misrepresented a past or present material fact of which it knew or should have known and which was distinct from any contractual promises. See Hanks v. Hubbard Broadcasting, Inc., 493 N.W.2d 302 (Minn. Ct. App. 1992)(awarding $382,000 to a television co-anchor who forewent another job offer because station had promised promotional campaign which never occurred); see also Stewart v. Jackson & Nash, 976 F.2d 86 (2d Cir. 1992)(allowing attorney to sue law firm which had promised to set up an environmental department when it hired her, but which never set up the department); Pearson v. Simmonds Precision Products, Inc., 624 A.2d 1134 (Vt. 1993)(upholding $160,000 award to laid-off engineer who had been told when he was hired that company would not scale back operations, even though company knew that it would).

IV. THE USE OF TESTERS BY THE EEOC

A. Introduction

In December of 1990, the Equal Employment Opportunity Commission endorsed the use of "testers," individuals employed to collect evidence of discriminatory behavior. In its guidance to agency personnel, the Commission said it would accept discrimination charges from "testers."

Generally, "testers" work in pairs. In the employment context, one white tester and one black tester with similar resumes apply for the same job. Each is supposed to objectively record the details of their experience in an effort to determine if a given employer discriminates against minorities. Any evidence a tester may uncover may then be used in a subsequent discrimination claim against that employer.

The use of testers is most often discussed in the context of fair housing cases. The Fair Housing Act prohibits discrimination against any person on the basis of race when making representations about housing availability. In the U.S. Supreme Court case, Havens Realty Corp. v. Coleman, 455 U.S. 370, 102 S.Ct. 1114 (1982), the Court ruled "testers" have standing to bring a race discrimination claim under the Fair Housing Act. Standing requires the complaining party have a distinct and cognizable basis for bringing a claim. In its decision, the court stated, "[t]hat the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of [the Act]." Testing is also utilized by the Federal Trade Commission to detect discrimination by creditors and financial institutions.

B. Testers in Employment

Testers in the employment setting has merited little attention thus far in the nation's courts. In April of this year, the Massachusetts Commission Against Discrimination reached settlements with two Boston clothing stores it accused of racial discrimination in hiring. The original complaints had been issued after the Commission sent testers to 60 to 70 stores to investigate possible discrimination.

On June 18 of this year, the first case to use evidence from testers was decided in the District of Columbia. In Fair Employment Council of Greater Washington v. BMC Marketing Corp., Dist. Ct. D.C. Civil Action No. 91-0989 (June 19, 1993), the court ruled testers have standing to sue under Title VII of the Civil Rights Act. Title VII prohibits employers from discharging, refusing to hire or otherwise discriminating against any person on the basis of race, color, sex, religion or national origin.

The case involved four testers, two blacks and two whites, with apparently equal qualifications. Each applied for referrals at BMC Marketing Corporation, a franchise of a national employment agency. The white testers received job referrals while the black testers did not.

In its decision, the court made an analogy to fair housing cases explaining the statutory language prohibiting discrimination in job referrals and in housing is very similar. The court then ruled that since the testers were seeking job referrals, they were injured by the employment agency's failure to provide referrals. The court explained the testers could suffer future injury because the testers might return at any time to seek employment referrals and have now established the probability of future injury.

C. Conclusion

Since the BMC case involved job referrals, it is unknown how courts will respond in cases brought by testers alleging discriminatory hiring practices. The court expressly distinguished between the use of testers to challenge job referrals and the use of testers to challenge hiring practices. The court noted Title VII itself distinguishes between hiring and job referrals. The court also referenced Parr v. Woodman of the World Life Ins. Soc., 657 F. Supp. 1022 (M.D. Ga. 1987), where the court ruled against a plaintiff who brought a Title VII action for alleged discrimination in hiring. The Georgia court ruled the plaintiff was not injured by the failure to hire because he was not a "bona fide applicant" for the job.

Nonetheless, there is still concern about the potential ramifications of allowing tester evidence of any kind in employment discrimination cases. Criticism includes concerns raised by the U.S. Chamber of Commerce that testers "needlessly consumes the time and resource of the target employers." Other employer groups claim the use of testers generates suspicion and resentment and amounts to little more than deceit.

In a March 4, 1991 letter to former EEOC Chairman Evan J. Kemp, Jr., Washington D.C. attorney and former General Counsel of the National Labor Relations Board, John S. Irving expressed anxiety about allowing tester evidence in employment discrimination cases. Mr. Irving wrote:

> The disadvantage of encouraging tester activities is apparent. An investigation triggered by the charge or testimony of a tester begins with a lie. The tester misleads the employer into believing that the tester is genuinely interested in employment. In fact, the tester has no such genuine interest . . . . Given the need for integrity and

> objectivity in the investigative process, it is unwise for the EEOC to encourage the gathering of evidence under false pretenses.

Mr. Irving stated he was advising clients to determine at the beginning of the application process whether an applicant has a sincere interest in actual employment. Applicants would be required to sign an affirmative expression of genuine employment interest. Applicants who failed to respond affirmatively to this request would receive no further consideration.

In response, Mr. Kemp drew a distinction between a tester's misrepresentation of his or her actual interest in a job versus a tester's credibility concerning any discriminatory practices uncovered during the test. Mr. Kemp explained the tester's misrepresentation was inherent to the testing process, but the reliability of the tester's evidence would be assessed in the same manner as evidence which is provided by any other charging party or witness. As to the certification regarding an applicant's genuine interest in employment, Mr. Kemp stated there was no statutory or regulatory requirement of which he was aware that would prohibit such requests, although it might deter some persons from completing the application process.

It should be noted Mr. Kemp is no longer with the EEOC. Although the Clinton administration has yet to name a new Chairman, it is likely this Democratic administration will take a more aggressive approach against employment discrimination. Accordingly, we should see greater use of testers which will likely result in more court challenges to the EEOC's testing policy.

V. THE CIVIL RIGHTS ACT OF 1991 AND EMPLOYEE SELECTION

A. Introduction

The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (amending scattered sections of 42 U.S.C.) [hereinafter "CRA"], was a sweeping piece of employment related legislation that directly affected employer hiring and promotional practices. The CRA amended Title VII of the Civil Rights Act of 1964, section 1981 of the Civil Rights Act of 1966, the Attorney's Fees Awards Act of 1976, the Americans With Disabilities Act of 1990, and the Age Discrimination and Employment Act of 1967. It also reversed portions of several recent U.S. Supreme Court decisions, addressing employee selection and promotional practices. Consistently, this paper specifically discusses the CRA's effect on the burden of proof in disparate impact cases, "race norming" for employment tests, mixed motive standards, and voluntary affirmative action plans.

B. Burden of Proof in Disparate Impact Cases

Section 105 of the CRA states an employment practice is unlawful if the complaining party can demonstrate an employer uses an employment practice "that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the employer fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C.A. § 2000e-2(k)(1)(A)(i) (Supp. 1993). This provision effectively overruled part of the U.S. Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Disparate impact refers to an employment practice that disproportionately excludes people with specified characteristics from the workplace. If the selection technique excludes people on the basis of the protected categories, then it is unlawful.

Ward's Cove made it harder for plaintiff's to prove disparate impact. The Court's decision placed the burden on plaintiffs to show that a particular practice was responsible for a statistical imbalance in the workforce, but to counteract this showing, the employer only had to prove that the challenged practice had a business justification. The CRA altered the burdens established by *Ward's Cove* and shifted a greater burden to the employer. Under the CRA, once the plaintiff shows through statistical analysis that an employment practice caused a disparate impact, the employer must demonstrate that the challenged practice was *job related* and consistent with *business necessity*. 42 U.S.C.A. § 2000e-2(k)(1)(A)(i). If the employer meets this burden, then the plaintiff can still win if he proves that an alternative practice was available and the employer refused to adopt it. 42 U.S.C.A. § 2000e-2(k)(1)(A)(ii) (Supp. 1993). To date, however, no plaintiff, in any published legal opinion, has ever won a disparate impact discrimination claim based on the demonstration of an alternative practice. Niall A.

Paul, The Civil Rights Act of 1991: What Does It Really Accomplish?, 17 Employee Rel. L.J. 567, 574-75 (1992).

If the plaintiff successfully establishes through a disparate impact theory that the employer has engaged in an unlawful selection practice, the court may order injunctive relief or affirmative action, including hiring with or without backpay, or any other equitable relief the court may deem appropriate. 42 U.S.C.A. § 2000e-5(g)(1) (1981).

1. Current Case Law

For those few courts that have construed the CRA as applying retroactively or for those cases instituted after the enactment of the CRA, the courts have applied the burden of persuasion as delineated in the CRA. Typical of these is Stender v. Lucky Stores, Inc., 803 F. Supp. 259 (N.D. Cal. 1992), where employees filed a class action against a retail food chain alleging discrimination on the basis of sex and initial job placement, allocation of work hours, movement of part-time employees to full-time positions, and promotions in violation of federal and California law. As one alternative, the employees alleged discrimination upon the basis of disparate impact. Id. at 320. The court fully described the effect of the CRA on the theory of disparate impact including the heavier burden that the CRA placed on the defendant in contrast to the Supreme Court's holding in Ward's Cove. Id. at 320-21. Applying the CRA to the facts of Stender, the district court held that the employees had carried their burden of establishing a prima facie case of disparate impact under both the CRA and pre-CRA standards, and the defendant had not shown that its employment decisions were job related or consistent with business necessity or based on legitimate employment goals. Id. at 335-36.

2. Conclusion

Under the CRA, employers should keep in mind that if plaintiffs can establish through statistical proof that a selection technique caused a disparate impact, then the employers will be required to prove that the technique was job related and justified by business necessity to win the case. The CRA has placed a heavier burden on employers, thereby making it easier for plaintiffs to establish discrimination on a disparate impact theory.

C. "Race Norming" for Employment Tests

The CRA amended the Civil Rights Act of 1964 by prohibiting a method of scoring employment related tests known as "race norming." Specifically, section 106 of the CRA made it unlawful for an employer "to adjust the scores of, use different cut off scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin." 42 U.S.C.A. § 2000e-2(l) (Supp. 1993). This proscription applies whenever employers select or refer candidates for employment or promote them. Id. Prior to the CRA, employment test scores were commonly altered to benefit minorities and increase diversity, but legislators decided to prohibit this practice because of its discriminatory effect on others seeking employment. Thus, any employer that currently utilizes any form of affirmative action that involves altering of test scores must immediately cease this practice.

Please note that the CRA's prohibition against race norming applies only to tests that are employment related. Thus, the prohibition has no effect where the job-relatedness of a test is in question and has not yet been determined. Furthermore, this provision addresses only what is done with the results of a test; it does not speak to whether the test itself is fair with respect to a particular class of people.

Considering the interaction of the race norming provision with other aspects of the CRA leads to some interesting conflicts. Indeed, the strict race norming prohibition could potentially collide with the disparate impact theory of discrimination. Paul, supra, at 575-76. In disparate impact cases, plaintiffs challenge the use of employment tests that cause a statistical disparity in the workplace. Id. at 576. Potentially, plaintiffs could allege both a disparate impact claim and a race norming claim in the same suit. On the race norming claim, the plaintiff would have to prove the challenged employment tests were job related to prevail. Conversely, because the employer's defense in a disparate impact claim is that the employment test is job related and consistent with business necessity, the employer would bear the burden to prove that the test is job related in order to survive the disparate impact claim. Id. This burden of proof dilemma results in a catch-22 for both parties. If the employer proceeds with its defense on the disparate impact claim, arguing that the test is employment related, it assists the plaintiff's prime facie case on the race norming claim. If the plaintiff, however, proceeds with the race norming claim, the plaintiff would assist the employer in its attempt to establish a defense to the disparate impact claim. Id. Such a situation has not arisen in case law to this point, but it is possible.

1. Current Case Law.

Courts have rarely referred to the technique of race norming since Congress enacted the CRA. To date, a court has not truly heard a case based on the race norming provision of the CRA. In Billish v. City of Chicago, 989 F.2d 890, 892 (7th Cir. 1993), white firefighters offered challenges to racial favoritism in the promotions of minorities within the uniformed ranks of the Chicago Fire Department. As part of the selection process, the Fire Department administered employment examinations. Id. The results of these examinations were race normed to improve the scores of the minorities. Id. Consequently, the Fire Department promoted more minorities than it would have without altering the test results. Id. The district court had granted summary judgment to the city on the firefighters' reverse discrimination claims, but the appellate court reversed and remanded the case for trial. Id. at 897. While the appellate court did note that race norming was now forbidden by federal law, this factor did not form the basis for the appellate court's decision because the district court decided the case prior to the enactment of the CRA.[3]

In Dixon v. Margolis, No. 89-C-5019, 1992 W.L. 80512, at *1 (N.D. Ill. Apr. 14, 1992), some white male Illinois state policemen sought to intervene in a closed case to obtain modification of the terms of the parties' settlement agreement. The case was a class action in which black plaintiffs alleged that the defendants intentionally discriminated against them regarding promotions within the Illinois state police. Id. Eventually, with approval from the court, the parties entered into a settlement agreement. Id. In the settlement provisions, the Illinois state police agreed that if it found its employment examinations to have an adverse discriminatory impact against minorities then it would race norm the results. Id. at *2. The white troopers, seeking intervention, wanted to alter the settlement agreement. Id. at *2. As part of their contention that the plaintiffs' law suit was frivolous, they argued that race norming was prohibited by the CRA. Id. The argument was not addressed, however, because the court refused to allow the white troopers to intervene in a closed case. Id. at *4, 5. Thus, again the issue of race norming was mentioned but not actually addressed in the court's decision.

Finally, in the context of considering whether the CRA applies retroactively, federal courts in three cases have simply noted that the CRA does prohibit race norming. Baynes v. AT&T Technologies, Inc., 976 F.2d 1370 (11th Cir. 1992);

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[3] Most circuits have held that the CRA does not apply retroactively to cases in which judgment was entered before the act's pertinent effective date. See Baynes v. AT&T Technologies, Inc., 976 F.2d 1370 (11th Cir. 1992); Johnson v. Uncle Ben's, Inc., 965 F.2d 1363 (5th Cir. 1992); Luddington v. Indiana Bell Telephone Co., 966 F.2d 225 (7th Cir. 1992); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992); Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992), cert. denied, 113 S. Ct. 86 (1992). The EEOC has also concluded that the CRA does not apply retroactively to conduct occurring before the effective date of the act. Baynes, 976 F.2d at 1375.

Luddington v. Indiana Bell Telephone Co., 966 F.2d 225 (7th Cir. 1992); Maddox v. Norwood Clinic Inc., 783 F. Supp. 582 (N.D. Ala. 1992).

2. Banding

Banding is defined as a "technique that takes a range of scores whose differences are not statistically significant and, within the that band range, provides for promotions of candidates on the basis of considerations such as race or ethnicity, gender, work experience, past job dependability, and other factors that the hiring authorities deem appropriate." Bridgeport Guardians, Inc. v. City of Bridgeport, 933 F.2d 1140, 1148 (2nd Cir. 1991), cert. denied sub nom. Bridgeport Police for Equal Employment Opportunity, Inc. v. Bridgeport Guardians, Inc., 112 S. Ct. 337 (1991). In Bridgeport, the district court found a police department promotion examination had a disparate impact on minority candidates. Id. at 1144. The district court determined that "banding" the test scores was an adequate alternative practice that could achieve the government's legitimate goals with less adverse impact on minority candidates. Id. at 1145. The Second Circuit affirmed the district court's adoption of the banding alternative, but it did not consider applying the CRA's prohibition of race norming. See id. at 1148. See also Officers for Justice v. Civil Serv. Comm'n of San Francisco, 979 F.2d 721, 725-26 (9th Cir. 1992)(upholding City's proposed use of banding for test scores but not considering application of CRA's prohibition of race norming), cert. denied sub nom. San Francisco Police Officers Ass'n v. City and County of San Francisco, 113 S. Ct. 1645 (1993). The question is whether the CRA's prohibition of "race norming" is applicable to "banding." Because the banding remedy does not alter any test results, the CRA's race norming prohibition should not apply to it. The banding remedy, however, may be prohibited by other provisions of the CRA, specifically the prohibition against using race, color, religion, sex, or national original as a motivating factor for any employment practice. See 42 U.S.C.A. § 2000e-2(m)(supp. 1993)(For further discussion of this provision, see infra "mixed motive" standards.)

3. Conclusion

Although the CRA's race norming prohibition has gained little legal attention to date, employers who use tests as a selection device need to be aware that race norming is illegal. If you are a private or public employer who race norms test results, then you must cease this practice.[4] Employers should note, however, that if they cease the practice of race norming they may open themselves to more disparate impact claims because *the race norming may* have counteracted the disparate impact of their employment tests. This, in turn, may cause some employers to reconsider the use of employment tests.

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[4] On December 13, 1991, the Department of Labor ordered state employment service agencies who used the General Aptitude Test Battery ("GATB"), an employment test, to cease "race norming" the results.

D. Mixed Motive Standards

The CRA also overturned the U.S. Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), where the Court held that if the plaintiff established that sex played a substantial part in the employment decision-making process, the employer could still avoid liability if it demonstrated it would have reached the same decision without considering the sex of the applicant. In contrast, section 107 of the CRA declares that such an employment decision is actionable even if the employer can demonstrate that the same decision would have been made without improperly considering the plaintiff's protected status. Specifically, section 107 states that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C.A. § 2000e-2(m) (Supp. 1993).

The CRA does limit the damages a complainant may receive if the employer proves that it would have taken the same action in the absence of the discriminatory motive. In such a case, the court may grant declaratory relief, injunctive relief, or attorney's fees, but it can not award damages or issue an order requiring any admission or hiring. 42 U.S.C.A. § 2000e-5(g)(2)(B) (Supp. 1993). If the employer fails to meet this burden, then he is subject to the full range of Title VII relief, including compensatory and punitive damages, reinstatement, hiring, promotion, and backpay. 42 U.S.C.A. § 2000e-5(g)(2)(A) (Supp. 1993).

Although federal courts have recognized the legal change that section 107 of the CRA makes to mixed motive analyses, see Crnokrak v. Evangelical Health Sys. Corp., 819 F. Supp. 737 (N.D. Ill. 1993); Kelber v. Forest Elec. Corp., 799 F. Supp. 326 (S.D.N.Y. 1992), to date, no court has applied section 107 to the parties before it because it is a substantive change, not to be retroactively applied. Nonetheless, this mixed motive provision promises to have a profound effect on employment discrimination litigation, and it may threaten the viability of some affirmative action programs.

E. Voluntary Affirmative Action Programs

The most controversial part of the mixed motive provision is its potential application to voluntary affirmative action programs. See David A. Cathcart & Mark Snyderman, The Civil Rights Act of 1991, in The Civil Rights Act of 1991 16-22 (ALI-ABA Study Materials 1992)(discussing mixed motive standards of CRA and effect on affirmative action programs). Because section 107 prohibits even partial discriminatory motivations in employment decisions, it has a direct bearing on affirmative action programs that consider these protected factors. Although the CRA does appear to uphold "affirmative action" at section 116 where it states that "[n]othing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with law" (emphasis added), that section is hard to reconcile with the proscription in section 107.

Even the members of Congress that addressed these provisions did not agree on what they meant. Sen. Dole's legislative history claimed that "this provision [section 107] is equally applicable to cases involving challenges to unlawful affirmative action plans, quotas, and other preferences." 137 Cong. Rec. S15476. Rep. Edwards, however, expressed a different conclusion:

> "It is our clear understanding and intent that this Section is not intended to provide an additional method to challenge affirmative action. As Section 116 of the legislation makes plain, nothing in this legislation is to be construed to affect . . . affirmative action . . . in accordance with the law. This understanding has been clear from the time this legislation was first proposed in 1990, and any suggestion to the contrary is flatly wrong."

137 Cong. Rec. H9529.

While section 116 of the CRA does state that nothing in the Act shall be construed to affect affirmative action in accordance with the law, the Act does not state what the law is. If the law is now section 107, then employers may no longer be able to justify a voluntary affirmative action program as part of a selection practice because plaintiffs will be able to claim that the selection practice is motivated in part by race, color, religion, sex or national origin. If "in accordance with the law" means the legal state of affairs prior to the CRA's enactment, then section 116 could be intended to preserve legal affirmative action programs initiated before the CRA, but what about affirmative action programs begun after the effective date of the CRA? Would section 107 apply to these new programs, thereby forbiding consideration of discriminatory motivations in hiring practices? To date, the courts have not provided definitive answers to these questions.

1. Current Case Law

In Officers for Justice v. Civil Serv. Comm'n of San Francisco, 979 F.2d 721 (9th Cir. 1992), cert. denied sub nom.

San Francisco Police Officers Ass'n v. City and County of San Francisco, 113 S. Ct. 1645 (1993), the San Francisco Police Officers' Association objected to the city's proposal to reweigh promotional examination results using a banding procedure after a Title VII consent decree. The Association partially argued that section 107 of the CRA prohibited the consideration of race as a factor in any employment decision. Id. at 725. The city argued that section 116 of the CRA controlled the issue, namely that nothing in the CRA affected court ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law. Id. The Association responded that the phrase "in accordance with the law" referred to the law as amended by section 107 of the CRA; thus, the race conscious promotions at issue were not "in accordance with the law." Id.

While noting that the Association's argument implicated the issue of the retroactive application of the CRA, the court decided it was unnecessary to reach this issue because it concluded the Association's reading of the CRA was based on an internal inconsistency: that Congress sought to protect affirmative action in section 116 while outlawing it in section 107. Id. Instead, the court held the more natural reading of the phrase, "in accordance with the law," was that affirmative action programs that were in accordance with the law before the CRA was enacted were unaffected by the CRA. Id. Because the district court held the city's banding proposal valid before the CRA was enacted, the Ninth Circuit held the CRA did not affect the city's affirmative action program. Id. Note, however, that the court did not address whether the CRA, particularly section 107, would have any affect on affirmative action programs initiated after the passage of the Act. To date, this is the only case that has come close to addressing this question.

2. Executive Order 11246

Hundreds of employers, who do business with the federal government, are subject to the federally-mandated affirmative action requirements of Executive Order 11246 and its accompanying regulations. See Executive Order No. 11,246, 30 C.F.R. 12319 (1965), reprinted in 42 U.S.C.A. § 2000e (1981). Lyndon Johnson initially issued the order in 1965, and it was amended several times prior to the enactment of the CRA. See id. The question is what effect section 107 of the CRA will have on these employers and the viability of the executive order. Although the courts have not addressed this matter, it is likely they will construe the CRA like the Ninth Circuit in Officers for Justice, and hold that the CRA, by virtue of section 116, does not affect affirmative action plans that were in accord with the law prior to the CRA's enactment. Again, the CRA's effect on affirmative action programs initiated after its promulgation remains unanswered.

3. Conclusion

Because of the ambiguity resulting from the clash of section 107, the mixed motive provision of the CRA, with section 116, employers should carefully think before embarking on a voluntary affirmative action program. Employers would be wise to wait until this area of the law is settled. Otherwise, if the courts hold that the mixed motive provision applies to affirmative action programs, employers could be liable for attorney's fees at a minimum and compensatory and punitive damages if the employer is unable to prove that it would have made the same employment decision absent consideration of the discriminatory factors.

VI. THE AMERICANS WITH DISABILITIES ACT OF 1990 AND EMPLOYEE SELECTION

Employment provisions of the American With Disabilities Act of 1990 (the "ADA") became effective for employers of 25 or more on July 26, 1992 and will become effective for employers of 15-24 employees on July 26, 1994. Generally, the ADA prohibits any type of pre-employment inquiries about a disability and prohibits any type of testing which has a disparate impact upon qualified individuals with disabilities. The prohibition is intended to ensure qualified candidates are not screened out because of their disability before their actual ability to perform a job is evaluated. It is not intended to prevent an employer from obtaining necessary information regarding an applicant's qualifications, including medical information necessary to assess qualifications and ensure health and safety on the job. 42 U.S.C. § 12112(c) (1991).

A. Pre-offer Inquiries

1. Generally, an employer may not make any pre-employment inquiries about a disability or about the nature or severity of a disability on an application form, in job interviews, or through background or reference checks.

    a. However, an employer may ask a job applicant questions about ability to perform specific job functions, tasks, or duties, as long as these questions are not phrased in terms of a disability. Questions need not be limited to the essential functions of the job.

    b. An employer may not make any medical inquiry or conduct any medical examination prior to making a conditional offer of employment. However, an employer may condition a job offer on the results of a medical examination or on the responses to medical inquiries if such an examination or inquiry is required of all entering employees in the same job category, regardless of disability.

2. The Application Form.

    a. Prohibited questions.

    Under the ADA it is clear that numerous topics, which otherwise may be considered innocuous, may not be broached on a job application form:

    -- Contraction of or treatment for various conditions or diseases;

- History of hospitalization;
- Treatment by psychiatrist or psychologist or for a medical condition;
- Number of days absent in previous years (may ask whether applicant will be able to meet employer's attendance requirements);
- Health-related reasons precluding performance of job;
- Physical defects which might preclude job performance;
- Whether the applicant is taking prescribed drugs;
- Treatment for drug addiction or alcoholism; and
- Previous filing for workers' compensation.

b. Permitted questions.

Employers may ask questions to determine whether an applicant can perform specific job functions. The questions should focus on the applicant's ability to perform the job, not on a disability.

- An employer may attach a job description to an application form with information about specific job functions, or the employer may describe the functions;
- An applicant may be asked whether he or she can perform the tasks with or without an accommodation;
- If the applicant indicates he or she can perform the tasks with an accommodation, he or she may be asked how he or she would perform the tasks, and with what accommodation or accommodations.

The employer may wish to inform applicants, on the application form or otherwise, about specific aspects of the job application process, so that applicants may request any needed accommodation.

3. Job Interviews.

The basic requirements regarding pre-employment inquiries and the types of questions prohibited on job application forms also apply to job interviews. An employer may not ask questions about a disability, but may obtain more specific information about the ability to perform job tasks and about any needed accommodation, as set forth below.

a. Essentially, the job interview should focus on the ability of the applicant to perform the job, not on disability.

b. Where an applicant has a visible disability or has volunteered information about a disability, the interviewer may not ask about:

-- The nature of the disability;

-- The severity of the disability;

-- The condition causing the disability;

-- Any prognosis or expectation regarding the condition or disability; or

-- Whether the individual will need treatment or special leave because of the disability.

c. Inquiries regarding ability to perform job functions and accommodations.

An interviewer may obtain information related to the applicant's ability to perform all job functions and about any need for accommodation.

-- If the applicant has a known disability that would appear to interfere with or prevent performance of a job-related function, he or she may be asked to describe or demonstrate how this function would be performed, even if other applicants do not have to do so.

-- However, if an applicant has a known disability that would appear not to interfere with a job-related function, the employer may only ask how the applicant would perform the function if all applicants are required to do so.

4. Background and Reference Checks.

Before conditionally offering a job, an employer may not request any information about a job applicant from a previous employer or anyone else that it may not itself request from the job applicant. Employment agencies or other agents who assist employers in hiring are held to the same standards. Employers may be held liable for actions of their agents.

B. Post-Offer Inquiries: Medical Examinations and Inquiries

Although an employer may not require a job applicant to take a medical examination or respond to medical inquiries before the employer extends a job offer, the employer may condition a job offer upon the satisfactory result of a post-offer medical examination or medical inquiry if these are required of all entering employees in the same job category. A post-offer examination or inquiry does not have to be job-related and consistent with business necessity.

However, if an individual is not hired because a post-offer medical examination or inquiry reveals a disability, the reason or reasons for not hiring must be job-related and necessary for the business. The employer also must show that no reasonable accommodation was available that would enable the individual to perform the essential job functions, or that accommodation would impose an undue hardship.

1. Permitted Inquiries.

The ADA recognizes employers may need to conduct medical examinations to determine if an applicant can perform certain jobs effectively and safely. Such examinations and inquiries must be made of all applicants for the same job category, not merely those with known disabilities or those whom the employer believes may have a disability.

a. An employer may require a full physical examination.

b. An employer may ask questions that are prohibited as pre-employment inquiries about previous illnesses, diseases or medications.

2. Rejection of applicant based upon medical examination or inquiry.

If a conditional job offer is withdrawn because of the results of an examination or inquiry, an employer must be able to show:

a. The reasons for the exclusion are job-related and consistent with business necessity, or the person is being excluded to avoid a "direct threat" to health or safety; and

b. No reasonable accommodation was available that would enable the applicant to perform the essential job functions without a significant risk to health or safety, or that such an accommodation would cause undue hardship.

c. The risk cannot be speculative or remote. The results of a medical examination may not disqualify persons currently able to perform essential job functions because of unsubstantiated speculation about future risk.

3. Confidentiality and limitations on use of medical information.

Although the ADA does not limit the nature or extent of post-offer medical examinations and inquiries, it poses extremely strict limitations on the use of the information obtained from such examinations and inquiries:

a. All information collected must be maintained on separate forms, in separate medical files, and treated as confidential medical records. No medical-related material should be placed in an employee's personnel file.

b. Although medically-related information must be kept confidential, supervisors and managers may be informed about necessary restrictions on the work or duties of an employee and necessary accommodations, and first aid and safety personnel may be informed where appropriate.

C. Testing

Employers may use any of several kinds of tests to determine job qualifications, such as aptitude tests, tests of knowledge and skill, intelligence tests, agility tests, and job demonstrations. The ADA imposes two requirements in relation to such tests:

1. If a test has a disparate impact, it must be job related and consistent with business necessity.

   a. A test has a disparate impact if it screens out or tends to screen out an individual with a disability or a class of such individuals on the basis of disability. As such, the test must be job-related and consistent with business necessity.

   b. A test will most likely be an accurate predictor of the job performance of a person with a disability when it most directly measures actual skills needed to do the job.

   c. An employer is only required to show that a test is job-related and consistent with business necessity if it screens out a person with a disability because of the disability. ADA requirements do not apply if a person was screened out for a reason unrelated to the disability.

   d. Even if a test is job-related and justified by business necessity, the employer has an obligation to provide a specific, reasonable accommodation if needed.

2. Accommodation in testing.

   a. The ADA requires that tests be given to people who have impaired sensory, speaking or manual skills in a format and manner that does not require use of the impaired skill, unless the test is designed to measure that particular skill.

   b. This requirement is imposed in order to assure that tests accurately reflect a person's job skills, aptitudes, or whatever else the test is supposed to measure, rather than the individual's impaired skills.

   c. An employer is only required to provide such an accommodation in the testing procedure if it knows, before administering a test, that an accommodation will be needed. It is generally the responsibility of the individual with the disability to request any required accommodation for a test. Of course, employers may want to inform applicants in advance of any tests that will be administered so that they may request an accommodation, if needed.

   d. An employer is not required to offer an applicant the specific accommodation requested. Although the request should be given consideration, the employer is only obligated to provide an effective accommodation.

D. Psychological Tests

Some employers use certain psychological tests, such as the Minnesota Multiphasic Personality Inventory (MMPI) and similar devices. None of the regulations or guidance issued under the ADA specifically address such testing techniques. Thus, it is unclear whether psychological tests will be treated as a medical test or an aptitude test. The classification of and therefore restrictions placed upon such tests will probably depend both upon the test itself and the position for which the test is utilized.

1. Psychological tests that test for aptitude.

    a. In certain instances, an applicant's psyche is directly related to a job qualification. For instance, candidates for jobs such as airline pilots may be required to meet certain psychological qualifications. In establishing such a psychological qualification, an employer does not have to show that the standards are job related, justified by business necessity or that they relate to an essential function of the job.

    b. However, if such a standard screens out an otherwise qualified individual with a disability, the employer must be prepared to show that the standard, as applied, is job-related and consistent with business necessity under the ADA. Even if job relatedness or necessity can be shown, the employer must consider whether the individual could meet the standard with a reasonable accommodation.

2. Psychological tests akin to medical tests.

    a. If, instead, the test is designed to, or has the effect of, exposing disabilities, it is likely to be treated as a medical examination. In that event, an employer would not be able to require that an applicant complete such a test before a conditional offer of employment is extended.

E. Drug and Alcohol Abuse.

The ADA specifically permits employers to ensure that the workplace is free from the illegal use of drugs and the abuse of alcohol, and to comply with other federal laws and regulations regarding alcohol and drug use. At the same time, the ADA provides limited protection from discrimination for recovering drug addicts and for alcoholics.

1. Use of illegal drugs.

   a. An individual who is currently engaging in the illegal use of drugs is not an "individual with a disability." An employer may therefore discharge or deny employment to current illegal users of drugs.

   b. "Current" use of drugs.

      If an individual tests positive on a test for the illegal use of drugs, the individual will be considered a current drug user under the ADA where the test correctly indicates that the individual is engaging in the illegal use of a controlled substance. In order to be current, the use of drugs must have occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an on-going problem.

2. Recovering drug addicts.

   Persons addicted to drugs, but who are no longer using drugs illegally and are receiving treatment for drug addition or who have been rehabilitated successfully are protected by the ADA from discrimination on the basis of past drug addiction. An employer may request evidence that an individual is participating in a drug rehabilitation program in order to ensure that drug use is not recurring.

3. Alcoholism.

   One who currently uses alcohol is not automatically denied ADA protection simply because of alcohol use. An alcoholic is a person with a disability under the ADA and may be entitled to consideration of accommodation if he or she is qualified to perform the essential functions of a job. However, an employer may discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct to the extent that he or she is not qualified.

4. Efforts to prohibit drug and alcohol use in the workplace.

   a. Pre-employment inquiries about drug and alcohol use.

      An employer may make certain pre-employment, pre-offer inquiries regarding use of alcohol or the illegal use of drugs. An employer may ask whether an applicant drinks alcohol or whether he or she is currently using drugs illegally. However, an employer may not ask whether an applicant is a drug addict or alcoholic, nor inquire whether he or she has ever been in a drug or alcohol rehabilitation program.

      After a conditional offer of employment, an employer may ask any questions concerning past or present drug or alcohol use. Again, the employer may not use such information to exclude an individual with a disability, on the basis of a disability, unless it can show that the reason for exclusion is job-related and consistent with business necessity, and that legitimate job criteria cannot be met with a reasonable accommodation.

   b. Drug testing.

      -- An employer may conduct tests to detect illegal use of drugs under the ADA. The ADA does not prohibit, require or encourage drug tests. Drug tests are not considered medical examinations, and an applicant can be required to take a drug test before a conditional offer of employment has been made. An employee can also be required to take a drug test, whether or not such a test is job-related and necessary for the business.

      -- An employer may then refuse to hire an applicant or discharge or discipline an employee based upon a test result that indicates the illegal use of drugs.

      -- If the results of a drug test indicate the presence of a lawfully prescribed drug, such information must be kept confidential. If the results reveal information about a disability in addition to information about drug use, disability-related information must be treated as a confidential medical record.

F. Remedies Under the ADA.

The ADA authorizes private causes of action and incorporates Title VII remedies, powers and procedures for claims of unlawful discrimination. The recently enacted Civil Rights Act of 1991 amends the ADA to make compensatory and punitive damages available for intentional discrimination.

G. Recent Decisions in Employment Screening and Selection Procedures.

1. Galloway v. District of Columbia Superior Court, 2 A.D. Cases 577 (D.D.C. 1993). The categorical exclusion of blind persons from jury service by the District of Columbia's trial court violates the ADA. The United States District Court for the District of Columbia held that visual observation was not necessarily an essential function of a juror. Even if an individual did not appear to be qualified, a reasonable accommodation could permit a blind person to serve. The court stated that its holding did not mean that blind persons must participate in every trial; but whether a blind person could competently serve in a given trial could be determined during voir dire.

2. D'Amico v. New York State Board of Law Examiners, 2 A.D. Cases 534 (W.D.N.Y. 1993). The State Board of Law Examiner's refusal to lengthen the bar examination time from two days to four days for a candidate with severe visual disability violates the ADA. The Court found that great weight should be given to the recommendations of the candidate's physician as to accommodations where there is no medical evidence to the contrary and the medical opinion does not appear to be outrageous on its face.

NUTS AND BOLTS: THE EMPLOYMENT CONTRACT

March 14, 1992

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Introduction

As Thomas H. Wright, General Counsel for Princeton University, pointed out in his article on faculty and the law[1], published in the special issue of the Journal of College and University Law commemorating the twenty-fifth anniversary of the National Association of College and University Attorneys (NACUA),

> "It is not much of an exaggeration to say that faculty have learned in the last twenty-five years that they are employees of their institutions."[2]

Wright explained that the relationship between faculty and their institutions has traditionally been one of "understanding" and "custom", but in recent years it has evolved more into one of articulated rules.

This trend has continued since Wright's observation in 1985. While unstated customs, practices and understandings still help define the relationship between faculty and their institutions, everyone involved has become increasingly aware that appointment letters, and faculty handbooks and university policies and procedures that are incorporated by reference into appointment letters, are generally contractual, binding documents. As contracts, they afford rights to the faculty and the institution and also impose obligations on them, which are enforceable in courts of law.

The Appointment Letter

An examination of the "nuts and bolts" of faculty employment contracts should include a discussion of the document which is the core of the employment contract — the appointment letter. In some cases, a sentence in an appointment letter has provided the basis for a breach of contract claim by a faculty member. On the other hand, a well-written appointment letter can eliminate some of the vagueness and ambiguity frequently found in traditional university-faculty relationships, thereby reducing the likelihood of misunderstandings and lawsuits.

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[1] Wright, "Faculty and the Law Explosion: Assessing the Impact — A Twenty-Five Year Perspective (1960-85) for College and University Lawyers," 12 Journal of College and University Law 363 (1985).

[2] *Id.* at 370.

The appointment letter usually takes the form of an offer by the institution to employ the faculty member under specified terms and conditions. The letter also sets forth the method by which the faculty member may accept the offer and the terms and conditions. When the faculty member accepts the offer, an employment contract is formed.

Except in special cases,[3] institutions and their faculty generally do not enter into lengthy, all-inclusive individual employment contracts. The typical appointment letter is short, perhaps one or two pages, and positive in tone. It commonly sets forth several of the rights granted to the faculty member – rank, title, salary, and duration of appointment – but rarely says much about the faculty member's obligations or about limitations on the faculty member's rights. Most appointment letters expressly incorporate the faculty handbook, and/or institutional regulations and policies, as part of the employment contract.

The typical format — an appointment letter which incorporates the faculty handbook – has several advantages, including fairness, efficiency and uniformity. Fairness is afforded from the faculty member's perspective, because the faculty handbook policies and procedures which are incorporated into the contract have in most instances been developed with significant input from faculty representatives. The format is efficient from the university's perspective, because most of the contract terms are in the faculty handbook, leaving only a few terms (e.g., rank, title, assignment, and salary) to be negotiated individually. Also, contract terms which are in the faculty handbook can be changed from time to time, at least prospectively, simply by amending the provisions of the faculty handbook. This avoids the necessity of renegotiating each individual contract. Finally, the format enhances uniformity among the multitude of faculty employment contracts, because so few of the contract terms are individually negotiated. This also means there is less opportunity for discrimination.

There are also some drawbacks to an employment contract consisting of a short appointment letter which incorporates the faculty handbook. For example, the parties have less flexibility to vary the standard contract terms. Perhaps more important, the typical appointment letter does not call the faculty member's attention to important faculty handbook provisions affecting the institution's and the faculty member's rights and responsibilities pertaining to matters such as duties and assignments, future compensation, reappointment, promotion, tenure and dismissal. Faculty handbooks tend to be poorly organized and replete with vague and ambiguous language. As a result faculty do not always read or fully understand them.

Sample Appointment Letters

Attachment #1 is a sample appointment letter for a tenure track faculty member developed by the writer. It utilizes the customary format described above, but attempts to eliminate some of the drawbacks. In particular, the sample letter differs from the typical appointment letter in that several key employment issues (e.g., right of the university to reassign the faculty member, right to modify the contract prospectively, right to renewal of the appointment, eligibility for tenure, procedure for awarding tenure, and grounds for dismissal during contract term) are addressed in the letter itself. Thus, the letter is intended to alert the faculty member to important contract terms which may otherwise be buried in the faculty handbook, if written down at all.

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[3] See, e.g., Stoner and Nogay, "The Model University Coaching Contract ("MCC"): A Better Starting Point for Your Next Negotiation," 16 *Journal of College and University Law* 43 (1989).

In preparing the sample form, the writer reviewed appointment letters from Ball State University, the University of Texas System, Southwest Texas State University, the University of New Mexico, the University of Notre Dame, Baylor University, Bucknell University, and the College and University Personnel Association (CUPA).[4/] The appointment letters used by the University of Texas System (Attachments #2A and #2B) and Southwest Texas State University (Attachment #3) are attached as additional examples for the benefit of counsel who are planning to revise their own institution's appointment letters.

These forms are, of course, only a *starting point*. The unique character of each college or university, including its history, customs, traditions, and whether it is public or private, will cause that institution's faculty employment contracts to be different from all others. Also, the forms must be modified for faculty members who receive multi-year appointments, those who are awarded tenure at the time of hire, those who are not on a tenure track, and those who have both faculty and administrative appointments. A separate (and much shorter) form should be developed for renewals of appointments.

Drafters who want to start from scratch may wish to review Attachment #4, which is a checklist for drafting faculty employment contracts. Another checklist for faculty employment contracts appears as Checklist 3 in Part VIII: Contracts in the Formbook for College and University Attorneys, published by NACUA. Although no employment contract will cover all of the issues raised in the checklists, they are helpful references in deciding what subjects should be addressed.

[4/] The writer appreciates the assistance of co-presenters Francie A. Frederick and William L. Fly, and Brett Miller of NACUA's Exchange of Legal Information Program, in providing these forms.

(date)

(name)

(address)

Dear ______________:

__________________ University is pleased to offer you a full-time tenure track appointment as a (rank) in the Department of (department), subject to the attached "Terms of Employment."

Your initial appointment will be for the 1992-1993 academic year at an annual base salary of $___. Your specific duties and responsibilities as a faculty member will be assigned by your Department Chairperson.

The "Terms of Employment" explain the conditions and procedures under which your appointment may be renewed for succeeding years. You will be eligible for tenure upon completion of seven years of service. Tenure may be attained only through official action by the Board of Trustees of the University.

To accept this offer, please sign and date the enclosed copy of this letter and return it to the Office of ______________, (address), not later than _______________, 1992.

We look forward to your becoming a member of our University community and anticipate a mutually productive relationship.

Sincerely,

(signature)

(title)

I have read and understand the "Terms of Employment" and I accept this appointment.

(date)

(signature of faculty member)

ATTACHMENT #1

TERMS OF EMPLOYMENT (Tenure Track Faculty)

This tenure track appointment to the faculty of __________ University is subject to the following terms and conditions:

Laws, Regulations and Policies. The appointment is subject to the applicable laws and regulations of the United States and the State of __________ and the policies, rules and regulations of the University, including but not limited to those contained in the Faculty Handbook. By accepting this appointment, the faculty member agrees to comply with these laws, rules, regulations and policies, as amended from time to time. A copy of the Faculty Handbook is furnished to each regular faculty member and updated annually. In the event there are any inconsistencies between published University policies, rules or regulations and this appointment letter, the University policies, rules and regulations shall control unless otherwise set forth below in "Special Conditions."

Period of Service. The faculty member has an academic-year appointment which requires the faculty member to be in attendance at the University beginning with the initial University faculty meeting held in advance of the first day of classes for the academic year and continuing through the May Commencement ceremonies following the end of classes for the academic year, unless excused by the faculty member's Department Chairperson and College Dean.

Salary. The faculty member's salary, less withholdings required by state and federal law and any other deductions authorized by the faculty member, will be paid in ____ equal monthly installments beginning __________, 1992. Approximately ___ months' salary is paid prior to being earned. If the faculty member's employment terminates prior to the end of the academic year, the faculty member must reimburse the University for any unearned salary.

If the faculty member's appointment is renewed for succeeding year(s), the annual base salary for these year(s) will be determined in accordance with the University's salary policies and procedures set forth in the then current edition of the Faculty Handbook.

Employee Benefits. The benefits available under the University's employee benefit plans (e.g., health care, life insurance, disability, leave and retirement plans), and the faculty member's eligibility to participate in the plans, are governed by the provisions of the plans. The plan provisions are summarized in the Benefits Handbook. A copy of the Benefits Handbook is furnished to each regular faculty member and updated annually. In the event there are any inconsistencies between the plan provisions and the Benefits Handbook, the plan provisions shall control.

Duties and Responsibilities. The faculty member is required to devote full time to teaching, research, publication and University and public service in accordance with the policies of the University, unless otherwise set forth below in "Special Conditions." The faculty member's specific duties and responsibilities will be assigned by the faculty member's Department Chairperson.

During the term or upon renewal of the faculty member's appointment, the University reserves the right to change the faculty member's duties and responsibilities or reassign the faculty member to another position (including one in a different academic Department), consistent with the needs of the University, so long as such change or reassignment is commensurate with the faculty member's abilities, educational training and professional status.

The faculty member shall abide by the ethical standards for faculty described in the University's Statement on Professional Ethics, as set forth in the then current edition of the Faculty Handbook. Serious violations of these ethical standards shall be adequate cause for terminating the faculty member's appointment before the end of the specified term.

Renewal of Appointment. Either the University or the faculty member may elect not to renew the appointment for the following academic year without stated cause, subject to the notice requirements set forth below.

The University will renew the faculty member's appointment for the following academic year unless the University gives the faculty member written notice to the contrary by the applicable deadline set forth in the then current edition of the Faculty Handbook. University policy presently states that a tenure track faculty member in the first year of service shall receive notice of non-renewal not later than March 1; one in the second year of service shall receive notice of non-renewal not later than December 15; and one in the third or subsequent year of service shall receive notice of non-renewal at least 12 months before the expiration of the faculty member's appointment. An appointment which is not renewed expires automatically at the end of the academic year to which it pertains, without further obligation on the part of either the University or the faculty member to the other.

No stigma attaches to the non-renewal of a faculty member's appointment, because non-renewal may result from any one or more of several factors, including but not limited to: (1) programmatic considerations, (2) financial and enrollment factors, (3) the faculty member's failure to meet or exceed the University's minimum performance standards for tenure track faculty members, (4) the faculty member's failure to satisfy a "Special Condition" set forth below, or (5) changes in the University's mission or policies. Neither satisfactory performance nor satisfaction of all "Special Conditions" guarantees renewal of an appointment. A faculty member who has received notice of non-renewal may file an appeal in accordance with the procedures described in the then current edition of the Faculty Handbook.

A faculty member who elects not to renew an appointment for the following academic year shall give the University written notice of non-renewal at the earliest possible opportunity, but not later than May 15, or 30 days after receiving notice of the terms of appointment for such year, whichever date occurs later. The faculty member may request a waiver of this requirement of notice in case of hardship or in a situation where the faculty member would otherwise be denied substantial professional advancement.

Promotion and Tenure. The faculty member's eligibility for promotion and tenure will be determined in accordance with the University's promotion and tenure policies and procedures as in effect on the date the decision concerning promotion or tenure is made, and, in addition, will be subject to the faculty member's satisfaction of the "Special Conditions," if any, set forth below.

University policy presently states that a tenure track faculty member is eligible for tenure upon completion of seven years of service. The faculty member will be evaluated periodically during the probationary period preceding tenure eligibility. In the sixth year a formal review will be conducted by appropriate faculty committees and administrators, and a decision will be made whether to recommend that the faculty member be awarded tenure. The periodic evaluations and the formal review will conform to University policies and procedures, including standards and criteria, in effect at the time the evaluations and review are conducted. If the faculty member is not recommended for tenure in the sixth year, the faculty member will receive a terminal appointment for the following academic year. When the terminal appointment expires, neither the University nor the faculty member shall have any further obligation to the other. A faculty member who is not recommended for promotion or tenure may file an appeal in accordance with the procedures described in the then current edition of the Faculty Handbook.

Neither satisfaction of all "Special Conditions" nor a positive tenure recommendation in the sixth year guarantees that a faculty member will be awarded tenure. While these are prerequisites to an award of tenure, at __________ University tenure may be attained only through official action by the Board of Trustees of the University. Faculty members have no contract right or property interest in tenure unless and until tenure is officially awarded by the Board of Trustees. In the event the Board does not award tenure to a faculty member who received positive tenure recommendations from all appropriate faculty committees and administrators, the faculty member will receive a terminal appointment for the academic year following the Board's decision not to award tenure. When the terminal appointment expires, neither the University nor the faculty member shall have any further obligation to the other.

Termination of Appointment During Term. The University may terminate the faculty member's appointment before the end of the specified term for adequate cause (as defined in the University's dismissal procedures for tenured faculty) or medical reasons, or because of financial exigency or discontinuance of a program or department of instruction. A faculty member whose appointment is terminated during its term for adequate cause shall not be entitled to salary or employee benefits (except as required by law) following the effective date of termination. A faculty member whose appointment is terminated during its term for any other reason may be entitled to additional salary or employee benefits following the effective date of termination, if and to the extent provided in the applicable University policies and procedures. A faculty member whose appointment is terminated before the end of the specified term may file an appeal in accordance with the procedures described in the then current edition of the Faculty Handbook.

Assignment. The rights of the faculty member and the University hereunder are personal to that party and may not be assigned or transferred to any other person or entity. The faculty member's duties and responsibilities may not be delegated.

Other Agreements. The University shall not be bound by any prior promises, agreements or understandings, oral or written, regarding the faculty member's employment by the University. The terms and conditions applicable to the faculty member's appointment may not be changed orally but only in a writing duly approved by the University through its authorized representative in accordance with established University procedures.

Special Conditions. The following Special Conditions apply to the faculty member's appointment (completion of degree as condition for promotion and/or tenure eligibility, grant of years of service credit toward tenure eligibility, variance from obligation to devote full time to teaching, research, publication and University and public service, etc.):

ACADEMIC FORM 2
FACULTY APPOINTMENT ONLY

Name and Address

(Date)

MEMORANDUM OF APPOINTMENT, 19___ - ___ Fiscal Year

The Board of Regents of The University of Texas System has authorized your appointment to the following position at The University of Texas at ________________________.

ACADEMIC TITLE	TENURE STATUS

DEPARTMENT	PERIOD OF APPOINTMENT	PERCENT TIME	MONTHS	SALARY

This appointment is subject to the Rules and Regulations of the Board of Regents of The University of Texas System and the University. The salary figure represents the gross salary and is subject to deductions required by state and federal law and such other deductions as you may authorize. Where the source of payment for all or part of the stated salary is from other than state general revenue, the obligation for payment is dependant upon availability of funds from that source. A revised Memorandum of Appointment will be sent when there is a change in the status of your appointment during the stated appointment period.

Please indicate your acceptance of the appointment by signing and dating the attached copy of the memorandum in the space indicated below and return to the Office of the _______________ by September _____, 19___, in order that your name may be place on the payroll for the next fiscal year.

____
President

I accept this appointment: ____

Date: ____________________________________

ACADEMIC FORM 3
FACULTY AND ADMINISTRATIVE
APPOINTMENT

Name and Address

(Date)

MEMORANDUM OF APPOINTMENT, 19___ - ___ Fiscal Year

The Board of Regents of The University of Texas System has authorized your appointment to the following position at The University of Texas at ____________ ________________.

ACADEMIC TITLE		TENURE STATUS		
DEPARTMENT	PERIOD OF APPOINTMENT	PERCENT TIME	MONTHS	SALARY
ADMINISTRATIVE TITLE		PERCENT TIME	MONTHS	SALARY

This appointment is subject to the Rules and Regulations of the Board of Regents of The University of Texas System and the University. The salary figure represents the gross salary and is subject to deductions required by state and federal law and such other deductions as you may authorize. Where the source of payment for all or part of the stated salary is from other than state general revenue, the obligation for payment is dependant upon availability of funds from that source. A revised Memorandum of Appointment will be sent when there is a change in the status of your appointment during the stated appointment period.

The administrative appointment is without term and subject to termination at the pleasure of the President. Salary for administrative duties terminates with the administrative appointment.

Please indicate your acceptance of this appointment by signing and dating the attached copy of this memorandum in the space indicated below and return to the Office of __________________ by September _____, 19___, in order that your name may be placed on the payroll for the next fiscal year.

____
President

I accept this appointment: ____.
Date: ____

Tenure Track

Dear ____________:

On behalf of Southwest Texas State University, I am pleased to offer you a teaching position as [rank] in the Department of [name of department]. This offer is a non-tenured position in a "tenure track." In this position, you will accrue tenure eligibility under the rules and regulations of the University and the Board of Regents of the Texas State University System. These rules are available in an abridged version in the Faculty Handbook; a copy of the complete rules is available in your departmental office and in your dean's office.

The attached "Terms of Contract" specifies several important conditions of the contract you are offered. You should notice especially the period of appointment; although the position offered to you accrues tenure eligibility, the period covered by this contract is specifically limited to that stated under "Period of Appointment." You should also notice the rank and the years of prior service, if any, which have been counted toward your tenure eligibility. This contract constitutes our agreement relating to your employment and is subject to the approval of the Board of Regents of Texas State University System. It may be renewed only be written agreement of both you and the University.

Employees of the University are subject to all the rules of the University and the Board of Regents and to state law, and if you accept this contract, you are agreeing to comply with them. Your chair will determine your specific duties and responsibilities as a faculty member. You maya be expected to participate in the activities of the Faculty Advancement Center periodically, and your teaching assignment may include some off-campus instruction.

To accept this offer, please sign and date the attached "Terms of Contract" and return it by the date indicated to the Office of the Vice President for Academic Affairs, attention {name of contact person].

I hope very much that you will accept this position with Southwest Texas State.

Sincerely,

[Name]
Vice President for Academic Affairs

SOUTHWEST TEXAS STATE UNIVERSITY

TERMS OF CONTRACT

NAME:

ACADEMIC RANK:

PERIOD OF APPOINTMENT:

PERCENTAGE OF FULL-TIME:

SALARY:

SPECIAL CONTRACT CONDITIONS:

None.

Chair: ________________________________, Department of [Name of Department]

Dean: __________________________________, School of [Name of School]

____ ______________________________ ____

Vice President for Academic Affairs President

Contract offer valid until _________________________________, 19 _____

Accepted this __________ day of __________________________, 19 __ _

____

Faculty Member

Terms of Contact

Special Contract Conditions

A.. Although you have had three or more years of prior full-time service as an instructor (or above) in other institutions of higher education, by acceptance of this contract you agree to a maximum probationary period of four years at SWT, beginning September 1, 1994. Your advancement to tenure will be reviewed during the 1996-97 academic year.

B. Since you have been credited with two years of prior full-time service as an instructor (or above) in other institutions of higher education, by acceptance of this contract you agree to a maximum probationary period of six years at SWT, beginning September 1, 1994. Your advancement to tenure will be reviewed during the 1997-98 academic year.

C. Since you have been credited with one year of prior full-time service as an instructor (or above) in other institutions of higher education , by acceptance of this contract you agree to a maximum probationary period of six years at SWT, beginning September 1, 1994. Your advancement to tenure will be reviewed during the 1998-99 academic year.

D. Since you have been credited with no prior full-time service in another institution of higher education, by acceptance of this contract you agree to a maximum probationary period of seven years at SWT, beginning September 1, 1994 Your advancement to tenure will be reviewed during the 1999-2000 academic year.

E. If departmental and institutional circumstances warrant re-employment, (two) additional one-year-only contracts may be offered. However, in no case will this appointment extend beyond (three) years, nor will it lead to tenure.

F. If the ____________________ degree is not completed prior to __________________________, this contract becomes void and must be renegotiated at the rank of ____________________________ and at a lower salary.

G. If the ____________________ degree is not completed prior to __________________________, the rank will be that of _____________________________, and the salary of ____________________.

H. For Lecturers: If departmental and institutional circumstances warrant re-employment, additional one-year-only contracts may be offered.

I. For those with prior full-time teaching experience: You have been credited with ______ steps for longevity with this contract.

J. Tenure review takes place in the next to the last year of the probationary period, so that at the end of that year you will be notified if tenure is approved for subsequent contracts. If tenure is denied the subsequent contract will be the final contract.

K. The University reserves the right at its discretion to modify or cancel the terms of this contract because of fiscal limitations, whether directed by the Legislature or otherwise. If a lower salary is necessary, you will be notified in writing. Then, within the time period specified in that notice (not less than five nor more than ten days), you must notify the University if you do not accept the contract at the revised salary.

CHECKLIST
FACULTY EMPLOYMENT CONTRACTS

I. Identification of Parties

II. Duration of Employment

A. Is the employment at-will, for an academic term, for the academic year, for the fiscal year, or for multiple years? Is there a provision for extension or renewal? If so, how does that occur?

B. For academic year employees, is there an opportunity for summer employment?

C. When is the faculty member expected to arrive on and depart from campus for the academic year? If the faculty member doesn't arrive by a specified date (and hasn't given notice and been excused), are employment rights forfeited?

D. If the faculty member also has an administrative appointment, is it at-will or for a specified period? If the administrative appointment is terminated, does the faculty appointment continue?

III. Rank, Promotion and Tenure

A. Is the appointment to the rank of instructor, assistant professor, associate professor, professor, or other?

B. When will the faculty member be eligible for promotion? What standards and criteria apply to promotion decisions? What process will be followed for evaluating the faculty member for promotion? What appeal rights, if any, does a faculty member who is denied a promotion have?

C. To what academic department is the faculty member attached?

D. Is the faculty member's appointment with tenure, non-tenured on tenure track, or non-tenured not on tenure track?

E. When will the faculty member be eligible for tenure? What standards and criteria apply to tenure decisions?

F. By what process will the faculty member be evaluated during the probationary period concerning progress towards tenure? Does a faculty member who has performed satisfactorily during the specified probationary period automatically obtain tenure, or must tenure be awarded by the governing board?

ATTACHMENT #4

G. What appeal rights, if any, does a faculty member who is denied tenure have? Is a faculty member who is denied tenure entitled to a one year terminal appointment? If so, may the university instead pay the faculty member the amount of the base salary for such year and immediately terminate the employment relationship?

H. Is the faculty member obligated to obtain a terminal degree to be eligible for promotion and tenure?

Duties and Responsibilities

A. What are the faculty member's general (and specific) responsibilities with respect to teaching, research, publication and university and public service? Should the contract include a clause obligating the faculty member to exert "best efforts" on behalf of the university and avoid unauthorized use of the university's name and property?

B. Is the faculty member expected to counsel students, maintain certain office hours, teach off campus, meet specified grading standards and deadlines, submit to student evaluations, serve on doctoral and other committees, comply with reporting requirements, participate in commencement ceremonies, etc.?

C. What is the administrative relationship or line of authority between the faculty member and the department, college and university administration?

D. Is the position full-time or part-time? May the faculty member do consulting work, or have outside employment? If so, is the university's consent required? Does this apply to charitable or volunteer work which doesn't interfere with university employment?

E. What are the faculty member's obligations to avoid conflicts of interest and conflicts of commitment?

F. Does the university own the rights to patents, copyrights, trade secrets, inventions, royalties, and ideas developed by the faculty member on "university time," in the course of university employment, or while using university facilities, materials and/or equipment? Who owns the rights to inventions which are not disclosed or developed until after the faculty member's employment terminates? What are the university's and the faculty member's respective rights and obligations with respect to executing and prosecuting patent applications, paying the costs of obtaining a patent, and defending the patent against challenges and infringements? If the university owns the faculty member's invention, to what extent will the faculty member share in royalties?

G. Does the faculty member have a contract right to a particular position or assignment? Is the university entitled to reassign the faculty member or increase, decrease or otherwise change the faculty member's duties? May the faculty member be reassigned to a different department, or to a non-faculty position, with substantially equivalent compensation and status?

H. Is there a set of ethical standards which apply to the university's faculty, such as the AAUP Statement on Professional Ethics? If so, may violations of these standards lead to disciplinary action, including discharge?

I. If the faculty member also has an administrative appointment, what duties and responsibilities attach to that position? May they be changed, increased, decreased or eliminated during the term of the appointment?

J. What are the university's responsibilities for providing the faculty member an office, research facilities, equipment, services, supplies, and secretarial help?

K. To what extent is the university responsible for reimbursing travel expenses? Will the university indemnify the faculty member for personal liability incurred in the course of employment?

V. Salary and Benefits

A. What is the faculty member's annual salary? Is the salary for a 9-month academic year or a 12-month fiscal year? At what intervals will the salary be paid?

B. Will any of the salary be paid before it is earned? If so, must unearned salary be repaid to the university if the faculty member's employment terminates before the end of the year?

C. If the faculty member's employment terminates before the end of the year on account of dismissal for adequate cause or due to death, ill health or other reasons, will the full annual salary be paid nonetheless?

D. If the faculty member's appointment is renewed, how will the salary be determined for succeeding years? Is there the opportunity for merit increases? If so, how is "merit" determined? Under what circumstances, if any, may the salary be reduced?

E. What deductions will be made from the faculty member's salary?

F. If the faculty member also has an administrative appointment, what part of the salary, if any, is attributable to the administrative appointment? If the administrative appointment is terminated, will the salary be reduced?

G. Are the salary and benefits (and the appointment itself) contingent on governing board approval of the terms? On governing board approval of the university's annual operating budget? On the availability of appropriated funds from the state legislature (or of grant funds)?

H. For what benefits will the faculty member be eligible — retirement plan, tax-deferred annuity, health care benefits, life insurance, short- and long-term disability benefits, worker's compensation, sick leave, vacation, holidays, cafeteria plan, sabbatical leave, unpaid leave of absence, professional development opportunities, residence or residence allowance, educational assistance program, recreational facilities, etc.? Where are these benefit programs described?

VI. Handbooks and Policy Manuals

A. Is the faculty handbook part of the employment contract, binding on both the university and the faculty member? If not, does the handbook contain a disclaimer to that effect?

B. Are other employment-related documents published by the university (benefits handbook, summary plan descriptions, etc.), or other university policies, regulations, customs, traditions or practices, part of the employment contract?

C. Do changes in the faculty handbook and new or amended university policies and regulations, which are adopted or amended after the faculty member's initial appointment, become part of the employment contract?

D. If there are inconsistencies between the language of the faculty handbook and the appointment letter, which controls? What about inconsistencies between the language of the faculty handbook and the actual policies and regulations adopted by the governing board?

VII. Renewal of Appointment

A. Will the faculty member's appointment be automatically renewed if the university doesn't give notice to the contrary by a specified date? What date? Must the university state a reason for non-renewal? What appeal rights, if any, does a faculty member whose appointment isn't renewed have?

B. Is a faculty member who elects not to renew an appointment obligated to give the university notice thereof by a specified date? What date? Under what circumstances will the faculty member be relieved of this obligation?

VIII. Termination or Dismissal

A. Assuming the faculty member is not an at-will employee, what are the circumstances under which the university can terminate the faculty member's employment before the end of the specified term (or, with respect to tenured faculty, at any time)?

B. How does the university define "adequate cause" for dismissal?

C. Can the university terminate a faculty member's employment for medical reasons (if not in violation of the Rehabilitation Act of 1973 or the Americans With Disabilities Act)?

D. Does the university have a policy providing for termination of a faculty member's employment because of financial exigency or for programmatic reasons? How is "financial exigency" defined?

E. What appeal rights, if any, does a faculty member whose employment is terminated have? Under what circumstances may the faculty member's employment be suspended during the pendency of "due process" hearings? Will the suspension be with pay?

F. If a faculty member's termination constitutes a breach of contract, does the employment contract provide for liquidated damages?

IX. Miscellaneous

A. Is the contract a personal services contract, under which neither party can assign its rights or delegate its duties and responsibilities to a third party?

B. Is each part of the contract severable, so that if one part is held to be invalid the rest remains intact?

C. Does the contract contain a merger clause, so that prior promises, agreements and understandings, oral and written, do not become part of the contract? Does the contract describe how it can be modified?

D. Does waiver by a party of any default or breach by the other party of a covenant, term or condition of the contract constitute a waiver of a later default or breach of the same or any other covenant, term or condition?

E. Does the contract provide for binding arbitration or other alternative dispute resolution of disputes related to the application or interpretation of the contract or otherwise arising out of the employment relationship? If arbitration is provided, what are the procedures? Are there certain types of disputes which are expressly excluded from the arbitration process?

F. Which state's laws govern the contract? What federal and state laws and regulations affect the contract and the employment relationship?

G. What is the method for giving notices to either party to the contract?

H. How does the faculty member indicate acceptance of the terms of the university's offer of employment? Will the offer be rescinded if the faculty member does not accept it by a specific date?

PERSONNEL POLICIES AND EMPLOYEE HANDBOOKS

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1992 NACUA Workshop
"Employment Law on a Changing Campus"

I. INTRODUCTION

There has been a rapid evolution in the law governing the workplace, especially with respect to the law of wrongful termination. Nationwide, courts and legislatures have brought significant change and uncertainty to the legal principles governing employment termination. The employment at will rule -- the doctrine that employment for no specified term is presumed to terminable by either the employer or employee for any or no reason -- has undergone considerable erosion. A number of states have by statute or common law decisions have created exceptions or eliminated outright the at will doctrine. Federal and state legislation prohibiting discriminatory discharge for a variety of reasons, including race, sex, religion and national origin, as well as regulating employment decisions, has further eroded the common law presumption. Congressional passage of the Americans With Disabilities Act and the Civil Rights Act of 1991 reflect renewed public interest in the workplace and an increased desire to limit the prerogatives of managerial discretion in the workplace and protect employees against unfair or discriminatory treatment. The rapidly evolving nature of employment law has created increased emphasis on development of effective management and personnel policies. Carefully crafted, correctly used personnel policies can the keystone of an employer's defense against employment-related litigation. Conversely, poorly-drafted, ill-conceived policies can in many cases become the most devastating weapon in the plaintiff's case.

This paper is an attempt to survey the field of legal developments regarding personnel policies in the workplace. The focus of this paper is to identify the number of legal issues that could implicate employee personnel policies. Instead, a brief statement of the applicable legal principles has been made.

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[1] This outline is intended for general information purposes only and should not be relied upon as legal advice.

II. PERSONNEL POLICIES/EMPLOYEE HANDBOOKS AS CONTRACTS.

A. General.

A majority of states have held that statements contained in employee handbooks and personnel manuals can form an implied contract with an employee.[2] On the other hand, several courts have continued to hold that unilaterally issued employee handbooks or other personnel policies, without more, cannot constitute implied promises of continued employment. [3]

The Supreme Court of New Jersey's opinion in Wooley v. Hoffman-La Roche, Inc.[4] is an example of the emerging trend toward enforcing employer promises contained in employee personnel manuals as binding contractual obligations. There the court held that the termination procedures in an employer's personnel handbook was an enforceable contract of employment, even in the absence of any mutual understanding between the employer and the employee. The court noted that its opinion could "make employers reluctant to prepare and distribute company policy manuals," but hoped that it would not since:

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[2] See, e.g., Hoffman-La Roche, Inc. v. Campbell, 512 So.2d 725 (Ala. 1987); Jones v. Central Peninsula General Hosp., 4 Ind.Empl.R. Cases (BNA) 1204 (Alaska 1989); Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025 (Ariz. 1985); Gladden v. Arkansas Children's Hosp., 728 S.W.2d 501 (Ark. 1987); Foley v. Interactive Data Corp., 47 Cal.3d 654 (1988); Wing v. J.M.B. Property Management Corp., 714 P.2d 916 (Colo. Ct. App. 1985); Wooley v. Hoffman-LaRoche, Inc., 491 A.2d 1257 (N.J. 1985); Duldulao v. Saint Mary of Nazareth Hosp., 505 N.E.2d 314 (Ill. 1987); Toussaint v. Blue Cross and Blue Shield of Michigan, 292 N.W.2d 880 (Mich. 1980); American Bank Stationery v. Farmer, 799 P.2d 1100 (Nev. 1990).

[3] See, e.g., Johnston v. Panhandle Co-op Ass'n, 408 N.W.2d 261 (Neb. 1987); Hunt v. IBM Mid-America Employees Fed. Credit Union, 384 N.W.2d 853 (Minn. 1986); Bauer v. American Freight Sys., Inc., 422 N.W.2d 435 (S.Dak. 1988); DeFosse v. Cherry Elec. Prods. Corp., 510 N.E.2d 141 (Ill.App.Ct. 1987); Benoit v. Polysar Gulf Coast, Inc., 728 S.W.2d 403 (Tex. App. 1987).

[4] 491 A.2d 1257 (N.J. 1985).

> All that this opinion requires of an employer is that it be fair. It would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have been made and then to allow the employer to renege on those promises. What is sought here is basic honesty: if the employer, for whatever reason, does not want the manual to be capable of being construed by the court as a binding contract, there are simple ways to attain that goal. All that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual; that regardless of what the manual says or provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without anyone's agreement; and that the employer continues to have the absolute power to fire anyone with or without good cause.[5]

In some states, the enforceability of an employer's personnel policies as contracts will depend on circumstances showing that the employee reasonably relied on the policies. For example, in Hepp v. Lockheed-California Co., 86 Cal.App.3d 714 (1978), the court held that an unwritten but "well established" practice of preferential rehiring of employees laid off for lack of work is enforceable when the plaintiff was aware of and reasonably relied on the practice. Conversely, in Knights v. Hewlett Packard, 230 Cal.App.3d 775 (1991), the court ruled that an employee could not base an implied contract claim on a manual containing termination guidelines designed for supervisors' use.

B. Public Employer Concerns Regarding Handbooks.

In addition to wrongful discharge lawsuits arising from personnel policies, public employers should be concerned about the impact of personnel policies on constitutional rights. Specifically, under the state's law, a government employer's personnel policies may constitute a "property interest" in continued employment that is protected by the Fourteenth Amendment to the United States Constitution. In such a case, the employer cannot discharge or otherwise affect that property interest without complying with the requisites of due process. For example, in Perry v. Sindermann, 408 U.S. 593 (1972), the Supreme Court held that a public school teacher had a right of tenure because the college administration had raised his expectations in the college's "faculty guide." For many years the guide provided:

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[5] 491 A.2d at 1257.

> Teacher Tenure: Odessa College has no tenure system. The administration of the college wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors and as long as he is happy in his work.

The Court held that this language created an expectation of continued employment protected by the Due Process Clause.

The test of whether a personnel policy or employee handbook creates a property right under the Due Process Clause is to be determined under state law. Board of Regents v. Roth, 408 U.S. 564 (1972). The source of the property interest can be a state statute, a local ordinance, a rule or a mutually explicit understanding. Perry, 408 U.S. 593. In general, if a property interest exists, the government employer must give the employee notice of the charges against the employee and an opportunity for the employee to present his or her side of the story before the termination occurs. See Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). However, if an employer has an effective post-discharge appeal procedure, the pre-discharge hearing need not be as extensive as it would be otherwise. Id.

C. Oral Statements/Actions As Binding Contracts.

In addition to written personnel policies and employee handbooks, oral statements and other actions of managerial employees may give rise to a binding contract. For example, Texas courts have held that statements by supervisors or other management employees to the effect that employees would not be terminated except for "cause" are enforceable where the managerial employee had express or implied authority to bind the employer. See Morgan v. Jack Brown Cleaners, Inc., 764 S.W.2d 825 (Tex.App.--Austin 1989, writ denied); Johnson v. Ford Motor Co., 690 S.W.2d 90 (Tex.App.--Eastland

1985, writ ref'd n.r.e.); United Transp. Union v. Brown, 694 S.W.2d 630 (Tex.App.–Texarkana 1985, writ ref'd n.r.e.).

D. Use of Disclaimers in Personnel Policy Manuals and Other Documents.

1. Handbook/Personnel Manual Disclaimers.

Some courts have recognized that employers can reserve rights or include disclaimers in personnel policy manuals to preclude implied contractual liability. Hicks v. Baylor Univ. Medical Center, 789 S.W.2d 299 (Tex.App. 1990); Simonson v. Meder Distrib. Co., 413 N.W.2d 146 (Minn.Ct.App. 1987); Stiver v. Texas Instruments, Inc., 750 S.W.2d 843 (Tex.App.–Houston [14th Dist.] 1988, no writ). Some courts have held that, to be effective, disclaimers of contractual obligation must be conspicuously stated in the handbook or personnel policy document. See Jones v. Central Peninsula General Hosp., 779 P.2d 783 (Alaska 1989); McDonald v. Mobil Coal Producing, Inc., 789 P.2d 866 (Wyo. 1988). Cf. Goos v. National Ass'n of Realtors, 715 F.Supp. 2 (D.D.C. 1989)(statements in two places in the handbook were sufficient to meet the notice requirements, although the statements were not outlined in red or made the subject of a so-called sign-off sheet); Preston v. Claridge Hotel and Casino Ltd., 555 A.2d 12 (N.J. Super.Ct.App.Div. 1989)(even though employer required employees to acknowledge reading and receiving the new company handbook, the at-will disclaimer in the new book was ineffective because the employees had not been "reoriented in the same manner as they had been" when they received the old handbook, which did not contain a disclaimer).

Even if the disclaimer is effective in barring the use of the personnel policy as a contractual document, employers have not been successful in using the unilateral at will disclaimer of the handbook to bar implied contracts based on alleged promises or other policies of the employer. For example, in Wilkerson v. Wells Fargo Bank, 4 Ind.Empl.R.Cases (BNA) 1057 (Cal.Ct.App. 1989), the employer argued that the at-will provision contained in a bank employee's handbook and in its service and operations manual established that the employee's employment was at will as a matter of law. The court disagreed, since there was evidence that the bank's practice was to terminate employees only based on just cause. The court held that the disclaimer only had the effect of "sanitizing" the personnel document from use as a contract; however, the disclaimer could not be used to bar a finding of implied contract based on other employer policies, where there was no express agreement by the employee to the disclaimer language.

2. Affirmative At-Will Agreements Contained in Employment Documents.

Many employers have, in addition to merely placing "disclaimer" language in their employment documents, have also required employees to sign express agreements acknowledging their at-will status. Many courts have interpreted these documents as going beyond mere disclaimers: they could have the effect of barring any implied contract theories. The theory is that the acknowledgement constitutes an express written contract for at-will employment; any oral or implied-in-fact contract for continued employment is barred as a matter of law. The courts enforcing such acknowledgements have made clear that the document signed by the employee need not be labeled an "employment agreement". As long as it is clear and ambiguous, the courts have held that an acknowledgement signed by the employee contained in an employment application,[6] stock option plan,[7] an inter-office memorandum,[8] an agency agreement,[9] or an inventions and trade secrets agreement[10] may be sufficient to bar any claim of implied contractual rights.

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[6] Slivinsky v. Watkins-Johnson Co., 221 Cal.App.3d 799 (1990); Reid v. Sears, Roebuck & Co., 790 F.2d 453 (6th Cir. 1986); Gianaculus v. Trans World Airlines, Inc., 761 F.2d 1391 (9th Cir. 1985). Cf. McLain v. Great American Ins., 208 Cal.App.3d 1476 (1989)(application with disclaimer ineffective because it also stated that employment conditions could be changed by the company without notice to employees); Seubert v. McKesson Corp., 223 Cal.App.3d 1514 (1990)(same); Wagner v. Glendale Adventist Medical Ctr., 216 Cal.App.3d 1379 (1989)(same).

[7] Shapiro v. Wells Fargo Realty Advisors 152 Cal.App.3d 467 (1984).

[8] Rafferty v. Commissioner of Pub. Welfare, 482 N.E.2d 841 (Mass.App.Ct. 1985).

The main issue in the above cases is whether the employee signed a sufficiently clear acknowledgement of his or her at-will status to bar any implied-in-fact promise. Indeed, some courts have made clear that the language used in the acknowledgement need not necessarily include the terms "at-will". For example, in Malmstrom v. Kaiser Alum. & Chem. Corp., 187 Cal.App.3d 295 (1986), the employee signed a trades secrets and inventions agreement, which included the statement that "Employer employs and shall continue to employ Employee at such compensation and for such a length of time as shall be mutually agreeable to Employer and Employee." The court held that this language created an express contract for at-will employment which barred a wrongful discharge lawsuit as a matter of law.

Employers should not see at-will disclaimers as the perfect "quick fix", however. Because at-will disclaimers have the potential of eliminating employee's contractual claims, courts in recent years have heightened the technical requirements for employment disclaimers. For example, courts have required that disclaimer language contain an "integration clause." See Seubert v. McKesson Corp., 223 Cal.App.3d 1514 (1990)(At-will agreement contained in employment application not effective to bar wrongful discharge claim where it was a standardized form that did not contain an integration clause). Another example of the highly technical interpretations courts may place on disclaimers is the Ninth Circuit's decision in Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264 (9th Cir. 1990). There, the plaintiff signed an employment application containing the following disclaimer:

> It is agreed and understood that by assigning me work with such salary as may be incident thereto, that this application shall constitute the terms of the contract of employment and that the

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[9] Baker v. Pennsylvania Mutual Life Ins. Co., 788 F.2d 650(10th Cir. 1986).

[10] Malmstrom v. Kaiser Alum. & Chem. Corp., 187 Cal.App.3d 295 (1986).

> relation between me and my corporation shall be hiring at will, terminable at any time by either party thereto.

Id. at 1269-70. The Ninth Circuit held that the disclaimer did not bar a claim for breach of promise to hire, since by its own terms the disclaimer did not begin to govern the plaintiff's employment until the employer assigned him work and paid him a salary. Id. at 1270.

III. OTHER LEGAL AND PRACTICAL CONSIDERATIONS REGARDING PERSONNEL POLICIES.

A. Discrimination Laws and Other Statutes.

Any personnel policy must be consistent with the applicable laws outlawing employment discrimination. For example, Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991[11] prohibits employers from having policies that discriminate on the basis of sex, race, color, national origin, or religion. For example, it would be illegal for an employer to have a policy which calculated pension contributions differently for men and women based on the perceived longevity of women. See City of Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978). The Age Discrimination in Employment Act ("ADEA")[12] makes similar prohibitions against age-related policies, such as mandatory retirement policies. The Americans With Disabilities Act ("ADA"), due to be effective this year, prohibits policies which discriminate against qualified individuals with physical or mental disabilities. The Texas Commission on Human Rights Act ("TCHRA")[13] is the state statutory equivalent of Title VII, ADEA and the ADA. Any personnel policy must be reviewed with respect to these and many other employment discrimination statutes.[14]

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[11] 42 U.S.C. § 2000e, et. seq.

[12] 29 U.S.C. § 621, et.seq.

[13] Tex.Rev.Civ.Stat.Ann.art. 5221k.

[14] For example, Texas, like many other states, prohibits discrimination against employees who have filed workers' compensation claims (Tex.Rev.Civ.Stat.ann. art. 8307c), or served on juries (Tex.Civ.Prac. & Rem.

B. Failure to Follow Personnel Policies As Evidence.

It is clear that an employer's failure to follow its own policies can be used as evidence of discrimination or lack of good cause. Inconsistent application of employer policies signals arbitrariness and can lead to an adverse judgment, whether the case is before a judge or a jury.

C. Employee Morale.

For the morale of current employees and the recruiting of potential employees, some protection against arbitrary conduct, limits on total management freedom and "fair treatment" should be considered. Indeed, fair, honest and consistent treatment of employees up to and through termination is the best practical defense to wrongful termination and due process litigation.

D. Unionization.

For employers subject to unionization campaigns, a flat-out "at-will" statement, permitting termination for cause or no cause, could well stimulate interest in union organization.

IV. RECOMMENDED PRACTICES TO REDUCE EMPLOYMENT RISK ASSOCIATED WITH PERSONNEL POLICIES AND EMPLOYMENT MANUALS.

A. Review All Employment Manuals, Policies, Handbooks and Documents.

1. Review all documents which may conceivably make reference to the grounds for employee terminations, circumstances under which an employee may be terminated, or any other matter relating to terms and conditions of employment.

Code Ann. § 122.001(a)), complained about hazardous conditions (Tex.Rev.Civ.Stat.Ann. art. 5182b, § 15), or against governmental employees who "blow the whistle" on employer violation of law (Tex.Rev.Civ.Stat.Ann. art. 6252-16a, § 2).

2. Role playing: Read the policies as if you were a terminated employee. That is certainly the way in which the terminated employee (and his/her lawyer and perhaps the judge and jury) is going to read your policies.

3. Collect old personnel manuals, and handbooks: Too many employers have out-dated policy manuals, directives and other employment related documents in their files. Many have not been used for years, but have never been canceled or superseded. These documents must be located, dealt with and specifically superseded, amended or canceled. Employees who may have arguably relied upon them should be given, and sign for, the replacement policies which explicitly revoke and supersede any previous policies. Arguments may surface concerning the employer's right to modify, amend or cancel prior policies, which can be dealt with. However, failure to clean house may result in a multitude of overlapping and conflicting policies which arguably continue to apply to employees.

B. Revise Handbooks and Other Documents to Reduce Employment Risks.

1. Disclaim contract.

The personnel policy should disclaim an intent to enter a contract. Include a statement in the personnel manual that there is no promise of any kind by the employer, that regardless of what the manual says or provides, that the employer remains free to change wages and other working conditions without notice, and that management reserves the right to discharge anyone with or without cause. See Stiver v. Texas Instruments, Inc., 750 S.W.2d 843 (Tex.App. -- Houston [14th Dist.] 1989, no writ). Employers are understandably reluctant to revise handbooks and personnel manuals to disclaim contractual effect. However, the perceived advantages in higher employee morale and advantage in union organizing campaigns should be weighed against the real cost if the "promises" contained in the personnel documents are enforced in court. In any event, the advantages may be more perception than reality: the real key to a union-free environment and high employee morale is consistent and fair treatment of employees in fact, not the mere recitals contained in formal employment documents.

If an employer decides to use disclaimers, it is cautioned against too heavy reliance upon disclaimers as a "quick fix" solution. At a minimum, all personnel documents distributed to employees should contain a prominent disclaimer, such as the following:

> This handbook does not create a contract of employment. None of the benefits or policies in this handbook are intended by reason of their distribution to confer any rights or privileges upon you, or to entitle you to be or remain employed by Employer. The contents of this handbook are presented as a matter of information only. While the Employer believes wholeheartedly in the plans, policies, and procedures described herein, they are not conditions of employment and may not be relied upon any employee as a contract or other right. In this regard, the provision of the handbook are subject to change at any time by the Employer, without notice.

2. Consider affirmative at-will contracts with Employees/Applicants.

An employer wishing to maximize its rights to maintain at-will status should consider the use of documents, signed by all new employees, acknowledging the at-will nature of their employment.

Examples:

Employment Application:

> I understand that if I am employed, my employment will be for no specified term and will be terminable at the will of either myself or the Employer. No contrary representations of any kind have been made concerning the length of employment, or grounds for termination. I further understand that any agreement contrary to the above will be effective only if contained in a written agreement signed by myself and the [authorized representative--e.g., Vice President of Human Resources] of the Employer.

Acknowledgement of Receipt for Employee Handbook or Other Documents Signed by the Employee:

> I have been given a copy of the Employee Handbook and I reviewed and understand its contents. I understand that this handbook supersedes any and all previous policies, handbooks and promises, express or implied, that it lists all of the Employer's obligations to me as an employee, and that I cannot rely upon any other promises or representations made to me by anyone concerning the terms and conditions of my employment. I understand that this document and other policies I may receive notice of do not create a contract of employment between myself and my employer. Specifically, I understand that nothing contained herein modifies or amends the right of the Employer to terminate my employment at anytime, with or without cause. I further understand that, to be effective, any contract of employment must be in the form of a written agreement signed by myself and the [authorized representative] of the Employer. I understand that I may not rely on any other purported oral or written promises or statements from any employee or representative of the Employer. I understand also that the wages, benefits and other employment policies and benefits referred to in the handbook are subject to change any time by the Employer without notice.

Employers should consult the law in their respective states to determine the precise language required to make the disclaimers legally effective.

3. Consider an "integration clause"

In your offer letter, or in any disclaimer or at-will provision, indicate that the entire contract of employment is contained in that document, and no representations to the contrary can be relied upon by the employee.

4. Avoid mandatory provisions.

The guidelines contained in employee personnel policies should be expressed in as permissive a fashion as possible. Look for words like "shall," "will" or "fair." Can you realistically depend on your line supervisors to follow the policies to the letter? If not, delete those duties from the handbook.

Although the policies should give reasonable direction to managerial employees, the policies should avoid giving the impression that its managerial directives form the basis for reasonable reliance by the employee.

5. Avoid complicated/unrealistic procedures and Requirements.

In drafting personnel policies, employers should be realistic about what steps they can reasonably expect their supervisors and employees to follow. Never draft procedures or policies in the abstract: always consider the fact that supervisors are not perfect, that procedures that are too cumbersome and complicated will stand less chance of being followed consistently. For those public employers with due process concerns, try to tailor the procedures to effect sufficient process without making the procedures too cumbersome.

6. Write in plain English.

Make sure that you translate your personnel policy directives from "bureaucratic speak" to English. Too often, no one (not even the drafter) has a clear, consistent understanding as to the meaning of a particular policy. By keeping language simple, supervisors can avoid problems caused by inconsistent application of the same rule.

7. Review the policies periodically.

In addition to drafting the policies carefully, employers must review it from time to time to make sure that it continues to be a realistic and accurate statement of the employer's procedures and policies. Also, the policies should be reviewed by inside/outside counsel to determine whether any policies should be added, modified or eliminated in light of changes in the applicable law. At a minimum, such policies should be reviewed once a year.

8. Avoid "probationary periods."

Some courts have construed the traditional probationary period in which the employer reserves the right to fire during the first thirty to ninety days of employment with or without cause as implying that the employer can only fire for cause thereafter. If employers do retain a "probationary" period, they should make sure (a) the employee is told that more frequent evaluations will occur during the initial phases of employment, but that completion of this period does not entail any guarantee of long-term employment; (b) that successful completion of the period makes the employee a full-time employee and therefore entitled to specified benefits, such as accrual of vacation pay; (c) that the employee is not taken off "probationary" status until all evaluations have been gathered and supervisors are able to make an informed judgment about him; and (d) that the employer has procedures for extending "probationary" status where necessary.

9. Clarification of terms of compensation.

Care should be taken not to express salary in annual terms, since the inference could be drawn that the employee is at least entitled to one year of guaranteed employment.

10. Eliminate references to "permanent" employees.

An employer should never refer to an employee as "permanent". An employer should instead use the term "regular" or "full-time" to distinguish such employees from "temporary" ones.

11. Comply with any employer policy in effect.

Failure of the company to follow its policies can be used as evidence of bad faith or discrimination in a particular instance. Policies should therefore leave the employer wide latitude, particularly where there is reason to believe that line supervisors will not follow the manual to the letter.

12. State obligations of employees broadly.

The employer should state as clearly as possible, and as broadly as possible, the obligations of employees. Thus, work rules, attendance expectations of the employer, as well as the "high standards of performance" which will be demanded by the Employer, should be set forth. If the employer expects more than merely "satisfactory" performance, it should communicate that fact. Further, when "misconduct" is defined broadly and state to result in termination, employees can hardly claim to have dad contrary "expectations."

13. Make termination clause permissive and general.

If you do mention termination in your manual and include a list of possible causes for termination, you make it general and non-exclusive and leave yourself room to add reasons as they arise in individual cases. Make it clear that an employee may be subject to layoff for business reasons, even if the employee is performing acceptably. Do you mention the possibility of termination for no cause? Consider whether you need to articulate to non-represented employees a statement of "management rights" similar to management rights provisions in union contracts. Do you have a stated policy or criteria to follow in choosing employees to be laid off? Will you mention seniority rights? Do you follow it religiously? If not, you should revise it to reflect realistic expectations. Is there a progressive discipline procedure? Can you expect it to be followed to the letter?

V. SELECTED POLICIES.

There is no particular policy or procedure that an employer should adopt. However, some states and the federal government require adoption of certain employment policies. Other policies may be advisable to limit exposure in discrimination/employment lawsuits. Employers should consult their particular states for guidance. The following represents areas where an employer should particularly consider adopting some sort of policy.

A. Drug and Alcohol Policies.

Under some state laws, such as Texas, many employers are required to adopt written policies for the elimination of drug use. In addition, the federal Drug Free Workplace Act os 1988 requires certain federal contractors to have a policy prohibiting drug abuse in the contractor's workplace. Notwithstanding the above, employers are generally not required to perform drug testing. A drug and alcohol policy would include the following: a) the definition of illegal drugs; b) it should prohibit sale, use or possession of drugs or alcohol in the workplace; c) it should prohibit use of alcohol or drug on Employer premises and/or during the time the employee is supposed to be working; and d) it should provide that an employee may be disciplined or terminated if he/she reports to work or is working under the influence of an illegal substance.

Employers should consult their own state's laws, as well as the Americans With Disabilities Act, before implementing drug and alcohol policies, especially drug testing. Also under the ADA it is unclear the extent to which an employer can discipline past substance or alcohol abuse by employees or the use of non-illegal (prescription) drugs in the workplace.

B. Equal Employment Opportunity.

Although there recently has been a great deal of publicity about the end of affirmative action, anti-discrimination laws are still on the books, still being enforced by the state and federal agencies, such as the U.S. Equal Employment Opportunity Commission. For those employers deemed federal contractors, they have specific affirmative action obligations under sections 503 and 504 of the Rehabilitation Act of 1973, which are enforced by the U.S. Office of Federal Contracts Compliance Programs. In addition, Titles VI and VII of the Civil Rights Act, Title IX of the Education Amendments of 1972, the Age Discrimination Act, Section 402 of the Vietnam Era Veterans Readjustment Act of 1974, and Executive Orders 121246 and 11375, all prohibit discrimination by many institutions of higher learning on a variety of grounds. Even if the employer is not covered by OFCCP (and therefore not required to develop an affirmative action plan), an employer should nevertheless consider including an equal employment opportunity statement. Such a statement can be helpful in defense of a discrimination charge filed before a state or federal antidiscrimination agency, such as the EEOC.

C. Sexual Harassment.

The United States Supreme Court in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), stated that an employer with a properly drafted sexual harassment policy may escape liability for so-called "hostile environment" sexual harassment may not be liable if the employee does not utilize the complaint procedures contained in the policy. The policy should define sexual harassment (using the EEOC guidelines), provide that sexual harassment of any kind will not be tolerated and will be punished, and provide a procedure for reporting sexual harassment that includes a means by which an employee can report harassment to someone other than the alleged harasser, a statement that all reports will be promptly and confidentially investigated, and an assurance against retaliation or reprisal for reports made in good faith.

ARTICLE

IMMIGRATION LAW AND HIGHER EDUCATION: EMPLOYMENT OF INTERNATIONAL EMPLOYEES

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INTRODUCTION

The challenge presented by the employment of nonresident aliens at institutions of higher education is growing. From the undocumented janitor to the international student to the distinguished foreign professor, the university represents a microcosm of our shrinking, ever more interdependent world. As a result of the rising influx of foreigners, and a relatively static federal budget, policy and administrative functions with respect to these sojourners are increasingly shifting to the campus. Thus, university counsel must develop a basic understanding of their institutions' responsibilities and liabilities with respect to the employment of aliens.[1]

I. THE LANGUAGE OF IMMIGRATION

Immigration has its own jargon:

An *alien* is one who is not a citizen by birth in the United States, birth to a citizen parent or parents abroad, or by naturalization or derivation (naturalization of parents).[2] Aliens may be undocumented, nonimmigrant, immigrant, or have an irregular immigration status. As used here, an alien is someone who is not a permanent resident of the United States.

A *nonimmigrant* is an alien who legally comes to the United States for a specific purpose and for a limited period of time. In most cases,

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[1] University counsel may need to retain experienced immigration counsel when necessary.

[2] Immigration and Nationality Act, § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1988 & Supp. I 1991).

the alien must have a residence abroad that he has no intention of abandoning.[3] The nonimmigrant has *nonimmigrant status* for the period during which a nonimmigrant is permitted to stay in the United States in a particular nonimmigrant category. If a nonimmigrant is "in status," he is within the designated period of admission and is behaving in accordance with the relevant nonimmigrant category. If the alien is "out of status" or has no status (undocumented), he has exceeded the period of authorized admission, is violating status (e.g., working illegally) or has entered the United States unlawfully. Nonimmigrant status is granted by the Immigration and Naturalization Service (INS) upon the alien's entry into this country or upon change of status or extension of stay.[4] Change of status from one nonimmigrant category to another is often possible if the alien is in the United States and is maintaining his present nonimmigrant status.[5]

An *immigrant* is an alien who legally comes to the United States to live and work permanently.[6] An immigrant may also be referred to as a permanent resident, lawful permanent resident, "LPR," or "green card" holder. The famous "green card," now pink, is evidence of lawful permanent residence.

A *visa* is permission to enter the United States and is almost always obtained at a United States Consulate abroad. A visa may be immigrant[7] or nonimmigrant.[8] If it is the latter, the visa usually takes the form of a multicolored stamp or decal affixed to the individual's travel document. The visa does not govern the period an individual is permitted to remain in the United States. It only governs the period during which she is permitted to make applications to enter the United States.

II. BRIEF OVERVIEW OF THE IMMIGRATION LAWS

The first immigration laws were codified in 1798 and gave Congress the power to exclude and deport aliens for national-security reasons.[9] In the 1880s and early 1890s, the influx of Chinese laborers to the West Coast produced legislation[10] severely limiting the ability of this ethnic group to immigrate. There was fear that "our country would be overrun by them."[11] In 1921, legislation[12] established immigration quotas based on the mix of nationalities in the United States population. The base year of 1890 was chosen because it favored immigrants from Northern and Western European countries. Although this system was at odds with the egalitarian ideals upon which this country was founded, it was not repealed until 1965.[13]

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[3] *Id.* § 101(a)(15), 8 U.S.C. § 1101(a)(5) (1988 & Supp. I 1991).

[4] 8 C.F.R. § 214.1 (1992).

[5] 8 C.F.R. § 248 (1992).

[6] Immigration and Nationality Act, § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1988 & Supp. I 1991) (Note that the term is defined by inference: one not coming to the United States temporarily for a specific purpose is an immigrant).

[7] *Id.* § 101(a)(16), 8 U.S.C. § 1101(a)(16) (1988).

[8] *Id.* § 101(a)(26), 8 U.S.C. § 1101(a)(26) (1988).

[9] *See* SUBCOMMITTEE NO. 1, HOUSE JUDICIARY COMM., 88TH CONG., 1ST SESS., IMMIGRATION TO THE UNITED STATES 1953-62 (Comm. Print 1963).

[10] Act of May 6, 1882, 22 Stat. 58 (1882).

[11] Chae Chan Ping v. United States 130 U.S. 581, 9 S. Ct. 623 (1889).

[12] Act of May 19, 1921, 42 Stat. 5 (1921).

The Immigration and Nationality Act[14] (INA) consolidated the previous patchwork of laws. The Act established a ceiling of 270,000 immigrants (permanent residents) per year, with a per-country limit of 20,000. A system giving preference to family- and employment-based immigration was developed. The INA remains the organic law of immigration.[15]

The 1980s produced three profound changes in immigration policy. The Refugee Act of 1980[16] established a uniform national policy for persons fleeing religious, political, or other persecution. Next, in response to national concern about illegal immigration, Congress passed the Immigration Reform and Control Act (IRCA) of 1986.[17] IRCA had two aims: to legalize the many undocumented workers in the United States and to stop the further flow of "illegals" by penalizing employers for hiring them. In addition, the Immigration Marriage Fraud Amendments of 1986[18] placed restrictions on aliens seeking to immigrate based on marriage to a United States citizen or permanent resident. It created a two-year conditional residence period to test the viability of the marriage.

In contrast with these pieces of legislation, the Immigration Act of 1990 (IMMACT '90)[19] comprehensively overhauled the immigration system. Categories for immigrants were reshuffled and expanded to fourteen new preferences. Some were transitional and some permanent. There was an increased emphasis on skilled labor. Employment-related visas were almost tripled, while visas for family-related immigration were held relatively constant. To provide diversity in immigration, a "green card lottery" was established for countries sending few immigrants to the United States. To spur investment, persons creating substantial sources of employment in the United States were, for the first time in history, permitted to "buy" lawful permanent residence.

Under the present scheme, three federal departments are primarily responsible for overseeing the immigration laws. The United States Department of Justice has four units with immigration-related powers. These include the INS, its largely autonomous Border Patrol, the Office of the Special Counsel for Unfair Immigration-Related Employment

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[13] Act of October 24, 1962, Pub. L. No. 87-885, 76 Stat. 1247 (1962).
[14] Act of June 27, 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952).
[15] Within the field, one usually cites to it rather than the United States Code.
[16] Act of March 17, 1980, Pub. L. No. 96-212, 94 Stat. 107 (1980).
[17] Act of November 6, 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).
[18] Act of November 10, 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1986).
[19] Act of November 29, 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

Practices (OSC), and the Executive Office for Immigration Review (EOIR). The INS approves applications for alien "sponsorship" (known as visa petitions); regulates the entry, stay and expulsion of aliens; naturalizes aliens and acknowledges citizenship; fines employers for hiring the undocumented; and apprehends individuals who smuggle, transport, or encourage the illegal entry of aliens.[20] Within INS, the Border Patrol monitors the nation's ports of entry and borders, and also carries out employer sanctions relating to alien smuggling. Overlapping jurisdiction, results in considerable friction between the Border Patrol and INS District Offices. The OSC enforces the provisions of IRCA that prohibit discrimination based on citizenship status.[21] Finally, EOIR carries out the deportation and exclusion of aliens and antidiscrimination measures.[22]

The Department of State, through consular offices abroad, issues, cancels, and revokes immigrant and nonimmigrant visas; investigates claimed employment credentials and family relationships; and issues certificates of expatriation, among other functions.[23] Decisions made by consular officers are not effectively reviewable by the courts or the Executive Branch.[24] A third agency, the United States Department of Labor (DOL), helps ensure that most immigrants, and certain students, longshoremen, and temporary workers, do not endanger the United States labor market.[25]

III. FACULTY AND STAFF

Aliens employed as faculty and staff on college campuses generally proceed along a well-worn path: they acquire temporary status and then permanent residence. The most common vehicle for temporary employment is the H-1B visa.

A. *Temporary Employment*

For most universities, the H-1B nonimmigrant category is the primary medium for employment of international faculty and staff, despite somewhat protracted and cumbersome procedures. Citizens of Canada can avoid the H-1B procedures because of the United States/Canada Free Trade Agreement.[26] The H-1B visa category is defined as "an alien coming temporarily to the United States to perform services . . . in a specialty occupation . . . ."[27] Specialty occupation means an occupation that "requires the theoretical and practical application of a specialized and highly theoretical body of knowledge and the attainment of at least a bachelor's degree or equivalent in the field of specialization."[28] As a matter of practice, virtually any faculty or staff member meets this basic requirement.

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[20] *See, generally*, IMMIGRATION LAW SERVICE § 2.25, (Dag E. Ytreberg, ed., 1992).

[21] *See, generally*, Immigration and Nationality Act, § 274B, 8 U.S.C. § 1324b (1988 & Supp. I 1991).

[22] *See, generally*, 8 C.F.R. §§ 3.0-3.38 (1992).

[23] Immigration and Nationality Act, § 104, 8 U.S.C. § 1104 (1988); *see, e.g.*, 22 C.F.R. §§ 7.1-7.9, 40.1-40.111, 41.1-41.122, & 42.1-42.83 (1992).

[24] United States v. Phelps, 22 F.2d 290 (2d Cir. 1927); *but cf.*, Pena v. Kissinger, 409 F. Supp. 1182 (S.D.N.Y. 1976). A bill, House Resolution 5173, the Consular Review Act of 1992, which would permit review of many visa denials, is pending before Congress. The bill is strongly supported by the American Immigration Lawyers' Association (AILA) and immigrants' rights groups. AILA Action Alert, Aug. 12, 1992.

[25] *See, e.g.*, Immigration and Nationality Act, §§ 212(a)(5), (m)(2), (n), 8 U.S.C. §§ 1182(a)(5), (m)(2), (n) (1988).

H-1B status can be acquired in one of two ways. First, if the alien is abroad, she may receive a visa at a United States consulate after certain application procedures are finished. If the alien is in the United States and maintaining lawful nonimmigrant status in another visa category, she may apply for a change of status to H-1B.[29]

1. Department of Labor Petitioning Process.

The mechanics of the H-1B petitioning process have changed considerably since the passage of IMMACT '90. Under prior law, the employer directly petitioned the INS. The procedure involved no labor-related constraints, including no test of the labor market. Under pressure from unions, however, Congress, in IMMACT '90, enacted controls over the H-1B petition process to ensure that foreign workers in this category do not undercut domestic wages and working conditions and to limit the number of foreign workers. This was done despite government-sponsored studies showing that H-1B workers had little or no effect on the domestic labor market.[30]

Under the post-IMMACT '90 scheme, the employer must attest to the Department of Labor (DOL) by the Labor Condition Application (LCA) that: 1) he is offering the higher of prevailing or actual wage; 2) he is offering prevailing working conditions; and 3) there is no strike or lockout at the place of employment. "Prevailing wage" means an average derived by surveying similar occupations in the area of intended employment and dividing by the number of employers surveyed.[31] "Actual wage" is the wage paid to workers similarly employed by the employer giving the attestation.[32] "Similarly employed" has been diluted substantially by recent statutory amendments[33] and regulation to mean someone employed in virtually the same job and with the same qualifications as the alien.[34] "Actual wage" becomes an issue only if the alien is paid less than someone "similarly employed." Wage issues do not occur with great frequency for faculty because of the finely-honed market sensibility of most institutions of higher education.[35] But this is not the case for researchers who, at least before IMMACT '90, were often paid very low salaries.

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[26] United States-Canada Free Trade Agreement, Annex 1502.1(C) and Schedule 2 thereto.

[27] Immigration and Nationality Act, § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(8)(b) (1988).

[28] *Id.* § 214(i)(1), 8 U.S.C. § 1184(i)(1) (1988); *see also* 8 C.F.R. § 214.2(h)(4) (1992).

[29] Immigration and Nationality Act, §§ 148, 214, 8 U.S.C. §§ 1184, 1258 (1988); 8 C.F.R. § 248 (1992); 22 C.F.R. § 41.53 (1992).

[30] Characteristics and Labor Market Impact of Persons Admitted Under the H-1 Program (1988) (study by Booz, Allen, & Hamilton, Inc., Betheseda, Md).

[31] 20 C.F.R. § 656.40 (1992).

[32] 20 C.F.R. § .715 (1992).

With respect to calculating the prevailing wage, the employer can rely on DOL figures, published surveys, or other authoritative information. If wage information other than that of DOL is utilized, careful records must be kept. Only reliance on DOL's information is certain protection against a public complaint.[36] Likewise, the employer should keep records of how the actual wage was determined.[37]

There are draconian penalties for willful misrepresentation in an LCA. The worst of these is disqualification from petitioning for temporary or permanent alien employees for a period of one year.[38] This could spell complete disaster for many research institutions.

The LCA is made by completing Form ETA 9035 and mailing or faxing two copies of it to the Regional Certifying Officer of the Department of Labor. That officer will then date-stamp and return the form to the employer. By law, the DOL checks the form only for completeness, accuracy and original signature.[39] Unless a complaint is filed by a private party, no investigation of the facts set out in the LCA occurs.[40] Pursuant to an amendment to IMMACT '90, the DOL must return the LCA within seven days.[41] The employer must post Form ETA 9035 for ten consecutive days in at least two conspicuous places at the workplace. An announcement by the employer to the public must also be made so that those who wish to may comment.[42]

2. INS Petitioning Process.

Once the LCA process is completed, the employer may petition the INS. At this point, the employer must demonstrate that the alien's prospective position is a specialty occupation and that the alien has the appropriate qualifications. Thus, the employer must furnish copies of the alien's credentials and a cover letter from the employer describing the nature of the position, its minimum requirements, its terms, and its salary.[43]

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[33] Immigration and Nationality Act, § 212(n)(1)(A)(i)(I), 8 U.S.C. § 1182(n)(1)(A)(i)(I) (1988) (as amended by Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Act of Dec. 12, 1991, Pub. L. No. 102-232, 105 Stat. 1733 (1991)).

[34] 20 C.F.R. § .710 (1992).

[35] Most colleges and universities rely on local and regional salary surveys to set professors' wages. *See, e.g.*, Board of Trustees CUPA Faculty Salaries by Discipline, State Composite-1991, (W. Ed. Stephens ed., McNeese State University, July 16, 1992).

[36] 20 C.F.R. § .730(e)(ii)(C)(1) (1992).

[37] *Id.* § .730(e)(iv)(2)(ii).

[38] Immigration and Nationality Act, § 212(n)(2)(C), 8 U.S.C. § 1182(n)(2)(C) (1988).

[39] *Id.* § 212(n)(1)(A), 8 U.S.C. § 1182(n)(1)(A) (1988).

[40] *Id.* § 212(n)(2)(A), 8 U.S.C. § 1182(n)(2)(A).

[41] *Id.* § 212(n)(1)(A), 8 U.S.C. § 1182(n)(1)(A).

[42] *Id.*

In connection with the petition process, the employer makes various certifications. First, the employer explicitly agrees to abide by the terms of the LCA. Second, the employer certifies that the employer will be liable for the reasonable costs of return transportation for the alien employee should the employee be dismissed during the authorized period of H-1B status.[44] In addition, the employer generally certifies, under penalty of perjury, that all of the information contained in the petition and supporting documents is true and correct. Finally, the individual signing the petition certifies that the individual is empowered to do so by the employing organization.[45]

Many public institutions have difficulty budgeting return transportation in case of dismissal during the authorized period of H-1B status. In some cases, the institution may force the alien to indemnify it by setting aside funds in a protected account or by signing an indemnification agreement. Although this arguably contravenes the purpose of the statute, nothing in the law forbids it.[46] The institution remains ultimately liable under the statute, even though it may have the right to seek indemnification from the alien employee.[47] Some institutions circumvent the budgeting problem by making the department chairpersons responsible for satisfying the expense from discretionary, nonpublic funds.[48]

Certification that the person who signs the petition is "empowered to do so" basically means that the signatory has actual hiring authority delegated by the institution. Universities usually delegate hiring authority to department chairpersons and directors. This raises the practical question of whether all persons with hiring authority should be allowed to sign visa petitions. From the institutional point of view, these two functions need not rest with the same person. At many institutions, strict controls have been imposed over the signing of petitions. Those authorized to sign have been reduced to a handful of individuals who have experience and knowledge concerning immigration matters. Without such controls, individuals who either do not recognize the inappropriateness of procedures or who may bind the institution to inappropriate obligations contained in the petition documents could sign and file petitions at will.

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[43] 8 C.F.R. § 214.2(h)(4)(iii) (1992).

[44] In the authors' experience, repatriation is more of a theoretical possibility than an everyday occurrence. As a general rule, H-1B faculty and staff not given continued employment with one institution almost always either return home voluntarily or obtain other employment.

[45] Willful misrepresentation is subject to the general penalties of 18 U.S.C. § 1001 (1988), as well as the specific document fraud penalties added by IMMACT '90, Immigration and Nationality Act, § 274c, 8 U.S.C. § 1324c (1988). Also, note that departure from the conditions of employment set out in the LCA can result in disqualification from the petition process as mentioned above.

[46] *Cf.*, employer sanctions provisions of the Act, wherein indemnification of employers by aliens for employer sanctions penalties is expressly forbidden. Immigration and Nationality Act, § 274A(g), 8 U.S.C. § 1324a(g) (1988).

[47] It should be noted that in cases of repatriation, as a practical matter, seeking the funds would be difficult, if not impossible.

[48] The University of New Orleans is an example of such an institution.

Certain regions of the Department of Labor have already instituted procedures that allow universities to designate a limited number of signatories for documents submitted to that agency.[49] The DOL maintains strict control over the signature process, and documents containing unauthorized signatures are summarily rejected. The INS, on the other hand, is an agency with a much higher volume of filings and considerably less efficiency. As a result, the INS has not yet established such controls. Though the institution may attempt to designate certain signatories with INS, it is unlikely that documents signed by unauthorized persons will be rejected.

IMMACT '90 imposed an overall annual quota of 65,000 H 1B aliens. The INS interprets 65,000 to mean the number of "aliens issued a visa or otherwise provided nonimmigrant status"[50] during the year[51] and has made it the employer's obligation to notify the agency if an alien does not utilize an approved petition to obtain status or a visa.[52] If the quota limit is reached, it is likely to occur close to the end of the year.[53]

At present, quota problems are only a theoretical possibility. The growing interdependence of the world economy and corresponding growth in the need for highly specialized workers, however, could make quota exhaustion a reality. If the quota is reached, any petition filed would be returned to the employer with instructions to file it in the new fiscal year.[54] Needless to say, no interim temporary status or visa can be accorded the alien in the absence of a quota number. This presents a serious problem to institutions of higher education. The federal fiscal year winds down precisely at the moment when new faculty and staff are expected to begin the academic year. Thus, institutions are advised to plan hiring of foreign faculty and staff far in advance and to petition for individuals as temporary workers as soon as possible after hiring decisions are made, despite any other employment authorization the employee may have.[55]

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[49] Letter of Charlene G. Giles, Regional Certifying Officer, United States Dep't of Lab., Region VI (Feb. 17, 1989).

[50] 8 C.F.R. § 214.2(h)(8)(A) (1992).

[51] The year in question is the federal fiscal year, Oct. 1 to Sept. 30.

[52] *Id.* § 214.2(h)(8)(D). However, as most employers are not likely to be aware of or undertake this requirement, the quota number as a practical matter will be the number of aliens approved for a H-1B visa or status, whether or not they actually utilize the approved petition for employment.

[53] The Booz-Allen study, for example, noted that the United States admitted about 55,000 "H-1" workers in July 1988. *See supra*, note 25. However, the H-1 category has now been split between H-1A nurses and most other temporary workers, H-1Bx. Moreover, most athletes and entertainers, and many others, have been siphoned off by the new "O," "P," "Q," and "R" nonimmigrant categories. Immigration and Nationality Act, §§ 101(a)(15)(O), (P), (Q), (R), 8 U.S.C. § 1101(a)(15)(O), (P), (Q), (R) (1988). Thus, the real impact of the quota may not be felt for several years.

[54] *Id.* § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E).

B. *Permanent Employment*

The second step for foreign faculty and staff is to petition for permanent residence. Any alien who is a lawful permanent resident[56] may be employed permanently and may change employers at will. Permanent residence is most often accomplished through a test of the labor market and by petitioning INS.

1. Labor certification.

The first step in obtaining permanent residence is labor certification.[57] In most cases, in order to hire an alien permanently, the employer must obtain a certification from the DOL that no United States workers (citizen, resident, asylee, refugee, temporary resident) are available to fill the job.[58]

Labor certifications for university positions involving any amount of teaching receive *special handling* under DOL regulations.[59] This enables the institution to follow its own recruitment procedure and select the best qualified person for the job. During the recruitment process, at least one advertisement must be run in a professional journal. *The ad must state the position title, duties, minimum qualifications, and the fact that the job involves teaching*. The labor certification must be filed within eighteen months of selecting the alien. The alien must possess *at minimum* the qualifications stated in the ad at the time the job was offered to the alien. If one of these requirements (such as the successful applicant being "ABD" rather than having received the Ph.D. at the date of hiring) has not been met in recruiting an alien, the special handling procedures may be repeated after the alien occupies the position. In other words, the school may select the alien all over again, after a re-recruitment specifically permitted by the *Technical Assistance Guide* of DOL.[60]

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[55] Note that ABDs and newly-minted Ph.D.s will often come to the institution with grants of practical training incident to their foreign student status. *See* discussion of practical training in the section on students.

[56] An alien that can show a "green card" or a stamp in his passport that says, "Processed for I-551—Temporary Evidence of Lawful Admission for Permanent Residence."

[57] Immigration and Nationality Act, § 212(a)(14), 8 U.S.C. § 1212(a)(14) (1988); 20 C.F.R. § 656 (1992).

[58] In some cases, for aliens who are of "extraordinary ability" or have been outstanding teachers or researchers for three years, the labor certification may be avoided. Immigration and Nationality Act, § 203(b)(1)(A), (B), 8 U.S.C. § 1153(b)(1)(A), (B) (1988).

[59] 20 C.F.R. § 656 (1992).

Some institutions restrict who may apply for permanent residence. For example, some universities allow only tenure-track faculty to apply, while others require only a minimal one- or two-year contract. In some cases, institutions exclude post-doctoral researchers from filing for permanent residence. The permanence of a position for purposes of labor certification, however, depends solely on the institution's present intent to keep the individual indefinitely. Reference need not be made to the employee's contract, typically one year in duration, as such a contract is virtually the universal practice for tenure-track faculty, alien or not, despite the institution's belief that the individual will achieve tenure.[61]

2. Classification Petition.

Once the labor certification is obtained, a petition (Form I-140) to classify the alien as a professional or skilled immigrant must be filed with the INS.[62] If the alien has more than two years of training, education or experience, and the position requires the same, the alien may obtain residence in most cases in about six months to a year from the date of filing the labor certification. Under IMMACT '90, a new quota system, effective October 1, 1991, almost tripled the number of visas available for employment-based immigrants. Thus, most previous waiting periods were greatly reduced or eliminated for the majority of occupations. Only those aliens coming to occupy jobs requiring less than two-years of training or experience, or those born in heavy immigration countries such as Mexico or the Philippines, now face long waiting lists. For labor certifications filed prior to October 1, 1991, the employer must file a preference petition no later than October 1, 1993.

3. Permanent Residence Petition.

An alien who has not worked illegally in the United States since January 1, 1977, has never been here illegally, entered the country with a visa and has continuously maintained lawful status since entry may obtain residence by filing Form I-485 and paying a fee of $120 once the I-140 is approved. If these qualifications are not met, the alien must seek a visa interview at a United States consulate abroad. The visa interview and related procedures normally require out-of-country travel for only a few days. In either procedure, the alien's spouse and minor children are simultaneously eligible for residence. Aliens subject to the two-year foreign-residence requirement,[63] and undesirable aliens,[64] must follow special waiver procedures or may be unable to obtain permanent residence.[65]

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[60] 20 C.F.R. § 656(D)(1) (1991).

[61] The Dep't of Lab. defines "permanent job" by inference, as one which is of necessity one year or more in duration. 20 C.F.R. § 655.100(c)(2)(iii) (1992).

[62] Immigration and Nationality Act, §§ 203, 204(a)(1)(D), 8 U.S.C. § 1154(a)(1)(D) (1988 & Supp. I 1991); 8 C.F.R. § 204.5 (1992).

IV. EMPLOYMENT OF STUDENTS AND EXCHANGE VISITORS

The laws and regulations pertaining to international students are complex; a full discussion of them falls outside the scope of this article.[66]

A. *F-1 Students*

Students who have maintained status, i.e., have been full-time students, may work on campus for up to twenty hours per week during the school session and full-time during vacations. A student who is out of status, however, may not work on campus until reinstated by INS. In the reinstatement process, students must indicate when and where they have been employed. This could expose institutions that employ students who are out of status.[67] Employing a student who is out of status would trigger the employer-sanction provisions of IRCA and could mean substantial penalties for the institution.[68]

B. *J-1 Exchange Visitors*

The exchange-visitor visa classification is used to bring students, trainees, professors, research scholars, international visitors and medical trainees to the United States for a variety of educational and training purposes. Exchange visitors are sponsored by one of 1,500 agencies, organizations or universities approved by the United States Information Agency (USIA). J-1 visa holders may work on campus according to the stipulations of their visa category (trainee, professor, student, etc.). Short-term visitors should be placed on J-1, rather than B-2 (tourist) visas, since B-2 visa holders cannot be compensated. Certain sponsoring organizations may restrict the employment of exchange visitors as a condition of receiving a grant or fellowship.

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[63] Immigration and Nationality Act, § 212(e), 8 U.S.C. § 1182(e) (1988) (requires that certain J visa holders must return to their home countries for two years if they receive funds from their own government, the United States government, or an international organization; have skills in short supply in their home countries; or come to the United States for graduate medical training. In some cases, waivers of the residence requirement are possible.)

[64] *Id.* § 212(a), 8 U.S.C. § 1182(a).

[65] *Id.* § 212(e), (g), (h), (i), 8 U.S.C. § 1182(e), (g), (h), (i).

[66] A fuller discussion of the legal issues affecting international students and scholars is available elsewhere. *See* ADVISER'S MANUAL OF FEDERAL REGULATIONS AFFECTING FOREIGN STUDENTS AND SCHOLARS (Alex Bedrosian, ed., NAFSA: Ass'n of Int'l Educators).

[67] 8 C.F.R. § 214.2(f)(16) (1992); INS Form I-539.

[68] *See, generally*, Immigration and Nationality Act, § 274a, 8 U.S.C. § 1324a (1988).

Some exchange visitors are funded by outside agencies and perform unpaid work on campus. In such cases, it is wise to have a procedure for documenting such services to ensure that the visitor is covered by insurance in case of accident or injury. Further, recent changes in the J-1 regulations stipulate that major medical coverage, with a minimum of $50,000 per incident, and repatriation insurance be purchased for exchange visitors and family members.[69]

V. EMPLOYER SANCTIONS

IRCA[70] imposes a dual obligation on employers: 1) to hire only those aliens authorized to work and 2) to keep records evidencing the right to work of all hires after November 6, 1986. The penalties for hiring undocumented workers or faulty record-keeping range from a $100 fine for a first offense to jail terms for consistent violators.[71]

Verification of employment authorization is often difficult and confusing, as some aliens are automatically entitled to work according to the terms of their visa status, while others must request permission to work.[72] Such permission may take the form of a letter, a passport stamp, a pink or white sheet, a yellow or white card, or a laminated card. Record-keeping is quite a bit simpler. Generally, within seventy-two hours of hire, every post-IRCA employee must execute INS Form I-9, certifying permission to work. The employer must also sign the form, attesting that a representative of the institution has checked the employee's documents and they appear to be genuine evidence of identity and authorization to work. A citizen need prove identity and citizenship; an alien must show identity and evidence of work authorization. The employer may not request more or different documents than those listed on the I-9 form.[73] Copies of the documents checked by the employer need not be kept with the I-9; it is, however, probably good practice to do so.

Since the passage of IRCA, the Office of the Special Counsel for Unfair Immigration-Related Employment Practices (OSC) has, with surprising alacrity, pursued employers large and small in its effort to prevent discrimination against certain classes of citizens and aliens.[74] The antidiscrimination provisions of IRCA apply to employers having three or more employees.[75] For those employers having fifteen or more employees, the EEOC exercises similar, but not identical, concurrent jurisdiction.[76] The classes of individuals protected by IRCA are United States citizens, permanent resident aliens, temporary resident aliens granted amnesty, refugees and asylees.[77]

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[69] 22 C.F.R. § 514.13(4) (1992).

[70] Act of November 6, 1986 Pub. L. No. 99-603, 100 Stat. 3359 (1988).

[71] Immigration and Nationality Act, § 274A(e)(4), (5)(f), 8 U.S.C. § 1324a(e)(4), (5)(f) (1988).

[72] *Cf.*, 8 C.F.R. § 274a.12(a), (b), (c) (1992).

[73] Immigration and Nationality Act, § 274A(b)(1), 8 U.S.C. § 1324a(b)(1) (1988).

[74] The extent of the OSC's and Administrative Law judges' zeal is on plain view in United States v. Louis Padnos Iron & Metal Co., 1992 OCAHO LEXIS 17 (Mar. 27, 1992) (LEXIS, IMMIG., OCHAO) which prohibits an employer from requesting a new employment authorization document, even when she knows an old one is expiring.

[75] Immigration and Nationality Act, § 274B(a)(2), 8 U.S.C. § 1324b(a)(2) (1988).

Currently, the issue arising most frequently concerns an employer's inquiry into an individual's immigration status at the time of hire and requiring documents different from, or in excess of, those required by law. The I-9 form has recently been revised to include a more comprehensive list of documents which may be requested of an individual seeking employment. The employer may not request documents which do not appear on the I-9, nor documents in addition to bare requirements stated on the form. If the employer has independent knowledge that the individual applying is an unauthorized alien or that a person in her employ has become unauthorized, however, the employer may refuse initial or continued employment.[78] In order to avoid a claim of discrimination, however, the institution in such cases would be well advised to document the specific information it possesses.

VI. TAX ISSUES

Tax issues for United States citizens are confusing and complex. Taxation of foreign nationals, however, is controlled by the type of visa, length of time in that visa status, eligibility for exemptions through one of thirty-five international tax treaties, and the amount of exemption permitted by visa type for each treaty. The two key issues regarding taxation are the definition of a non-resident alien for tax purposes and the the alien's eligibility for exemptions under a tax treaty.

A. *Tax Treaties*

The United States has tax treaties with thirty-five nations. Treaties that deal with tax issues are identified as one of several types of treaties: Estate Tax Treaties, Social Security Agreements, or Tax Treaties that deal with all other tax issues. The nature of the various taxes covered by Estate Tax Treaties extends beyond the scope of this article. Neither Tax Treaties nor the internal revenue laws[79] of the United States govern the other.[80] The Tax Code makes certain allowances for applicable treaties.[81]

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[76] 42 U.S.C. § 2000e-14 (1988). IRCA provisions apply exclusively, however, to "citizenship status" discrimination which is not based on national origin. Immigration and Nationality Act, § 274B(a)(1)(B), (a)(2), 8 U.S.C. § 1324b(a)(1)(B), (a)(2) (1988 & Supp. I 1991).

[77] Temporary residence is accorded to persons granted legalization under IRCA's several legislation programs. *See* Immigration and Nationality Act, § 245A, 8 U.S.C. § 1255(a) (1988). Such persons have been issued a laminated card bearing a green stripe along the top and a legend, "temporary resident." Refugees are individuals given the right to enter the United States from abroad because of fear of persecution in their homelands. *Id.* § 101(a)(42), 8 U.S.C. § 1101(a)(42). Similarly, asylees are aliens granted the right to remain in the United States because of fear of persecution abroad. *Id.* § 208, 8 U.S.C. § 1158. Both classes of individuals will be in possession of an INS work authorization document.

[78] 1 United States v. Louis Padnos Iron & Metal Co., 1992 OCAHO LEXIS 17 (Mar. 27, 1992) (LEXIS, IMMIG, OCAHO).

Generally, a tax treaty will describe the taxes and the persons affected by the treaty and will prescribe the withholding required of those who deal with such persons. Tax treaties use some terms that may be unfamiliar, including independent personal services, dependent personal services, and remittances or allowances. Independent personal services are those rendered in a relationship other than employment, while dependent personal services are those rendered in an employment relationship. For example, where the payor does not control what is done and how it is done, the relationship may be one of independent personal services. Remittances or allowances are amounts paid to a student by persons outside the United States. Treaties may include a specific definition of these terms and such a definition may be more restrictive than these general definitions.

B. *Who is a Nonresident Alien for Federal Tax Purposes?*

Subject to any applicable treaty, the Tax Code controls federal taxation of nonresident aliens.[82] For purposes of the United States income and related taxes, a nonresident alien[83] is a non-citizen and has *not*: a) become lawfully admitted, in accordance with the immigration laws, to the United States as a permanent resident at any time during a calendar year;[84] b) made a tax election to be treated as a resident alien under certain circumstances; c) met the substantial-presence test.

The substantial-presence test[85] is an objective test, based on the number of days a person is physically present[86] in the United States during a period of three years. Certain types of stays in the United States are disregarded under this test. Among the types of stays disregarded in determining whether an alien has met the substantial-presence test is a stay as a "teacher or trainee" or as a "student."[87]

The tax definitions of "teacher or trainee" and "student" incorporate the definitions of those terms in the Immigration and Naturalization Act[88] and include a separate requirement that the person substantially comply[89] with the requirements for being admitted into the United States.[90] Further, tax status as a "teacher or trainee" and "student" is limited to a specific period of time, regardless of that person's status for immigration purposes.[91] The tax definitions are used only for the physical-presence test in the tax definition of nonresident alien. A nonresident alien who does not meet tax requirements could be treated as a resident alien subject to United States income tax on world-wide income. A nonresident alien who holds a visa under subparagraphs (F), (J) and (M) of section 101(15) of the Immigration and Nationality Act[92] is hereafter called an "alien teacher or student." When the additional requirements of the tax-law definition of "nonresident alien" are imposed, that fact is noted.

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[79] The Internal Revenue Code of 1986, as amended.

[80] I.R.C. § 7852(d)(1) (1988).

[81] *Id.* § 894(a)(1) and Treas. Reg. § 1.871-12 (1988).

[82] I.R.C. § 894 (1988).

[83] *Id.* § 7701(b)(1)(B).

[84] *Id.* § 7701(b)(6).

[85] *Id.* § 7701(b)(3).

[86] *Id.* § 7701(b)(7).

[87] *Id.* §§ 7701(b)(3)(D)(i), 7701(b)(5)(A)(ii), & 7701(b)(5)(A)(iii).

[88] Immigration and Nationality Act, 8 U.S.C § 1101(a)(15)(F), (J), & (M) (1988).

C. *Federal Income Taxation of Nonresident Aliens*

Unlike United States citizens and resident aliens whose income tax is based on world-wide income, nonresident aliens pay tax only on "gross income from sources within the United States."[93] The source rules[94] are complex, but the purpose of this article precludes discussion of source rules for all types of specially treated income. A scholarship or fellowship granted by a nonresident alien is not "gross income from sources within the United States."[95] Compensation payments from a foreign employer to certain nonresident aliens are not subject to United States income tax.[96]

For certain tax purposes, an alien teacher or student is treated as a nonresident alien who is engaged in a trade or business in the United States and the taxable income, if any, from a scholarship from United States sources is treated as effectively connected with a United States trade or business.[97] This favors the scholarship recipient, if a return is filed,[98] because it allows the alien teacher or student to: a) deduct certain expenses,[99] and b) use the same graduated tax rate schedule[100] applicable to United States citizens, rather than the flat rate of thirty percent[101] that is generally applicable to a nonresident alien's income not effectively connected with a United States trade or business. In certain circumstances, an alien teacher or student may deduct one personal exemption, which would reduce federal tax.[102] An alien teacher or student is not generally entitled to a standard deduction.

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[89] For independent determination by the IRS, *see* Treas. Reg. § 301.7701(b)-3(b)(6) (Sept. 10, 1987).

[90] I.R.C. § 7701(b)(5)(C) and (b)(5)(D). *See also* Treas. Reg. § 301.7701(b)-3(b)(3) and (b)(4) (1992).

[91] I.R.C § 7701(b)(5)(E) (1992). *See also* Treas. Reg. § 301.7701(b)-3(b)(7) (1992).

[92] Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15) (1988).

[93] I.R.C. § 872(a) (1988) and Treas. Reg. § 1.871-1(a) (1988).

[94] *See, generally,* I.R.C. §§ 861-865 (1988).

[95] *See Scholarship or Fellowship Grants,* IRS, Withholding of Tax on Nonresident Aliens and Foreign Corporations, Pub. 515, Rev. Nov., 1992, Catalog No. 15019L, 12. The authors have been unable to find regulatory support for this position.

[96] I.R.C. § 872(b)(3) (1988) and Treas. Reg. § 1.872-2(b) (as amended in 1974).

[97] I.R.C. § 871(c) (1988) and Treas. Reg. § 1.871-9 (as amended in 1972).

[98] I.R.C. § 874 (1988).

[99] *Id.* § 873(a).

[100] *Id.* § 871(b).

D. *Social Security Tax*

The Social Security tax on self-employed individuals does not apply to nonresident aliens,[103] absent an agreement to that effect between the United States and the other nation.[104] When a college or university pays compensation for services to any enrolled student, citizen or noncitizen, who is regularly attending classes, those payments are not subject to the Social Security Tax.[105] When any employer pays compensation for services to a nonresident alien[106] who is an alien teacher or student, those payments are not subject to the Social Security tax if the alien teacher or student performs those services to carry out the purpose specified in the subsection of the Immigration and Naturalization Act under which the alien teacher or student is present in the United States.[107]

Among the exclusions in the definition of wages subject to the Social Security Tax are scholarship benefits, but only to the extent such benefits are not subject to income tax.[108] It may be possible to conceive of a scenario under which a grant from an educational organization that is partially taxable for income-tax purposes would be subject to the Social Security Tax. Educational organizations should investigate each situation, with particular emphasis on the Social Security definitions of "wages"[109] and "employment"[110] and on applicable Social Security agreements then in effect. If a payment is subject to Social Security Tax, then withholding may be required for that tax.

CONCLUSION

The academic and administrative needs of colleges and universities mandate hiring the best person for the position, and, whether the position involves a janitor or an endowed chairholder, the best person may be a foreign worker. Recent changes in federal laws and regulations have made the hiring and retention of these workers more complicated, but no less rewarding. College and university counsel should be aware of institutional responsibilities and liabilities and work with staff members in human resources, payroll, academic affairs, and student affairs to implement appropriate policies.

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[101] *Id.* § 871(a).

[102] *Id.* § 873(b)(3).

[103] *Id.* § 1402(b) (Note that residents of Puerto Rico, the Virgin Islands, Guam or American Samoa are not deemed to be non-resident aliens. The definition of non-resident alien intended here is the tax definition described before.)

[104] The IRS reports that the United States has Social Security Agreements with at least thirteen nations. IRS, United States Tax Guide for Aliens for 1991 Returns, Pub. 519, Catalog No. 15023, T 27.

[105] I.R.C. § 3121(b)(10)(A) (1988).

[106] Under the tax definition contained in I.R.C. § 7701(b)(1).

[107] *Id.* § 3121(b)(19).

[108] *Id.* § 3121(a)(20).

[109] *Id.* § 3121(a).

[110] *Id.* § 3121(b).

The Family and Medical Leave Act of 1993: Applications for Higher Education

by Thomas J. Flygare

Introduction

David Johnson is a tenured, full professor in the university's liberal arts college. His current teaching schedule, typical for senior faculty, consists of two courses that meet on Tuesdays and Thursdays. He recently sent the following note to his dean:

> The chiropractor has advised me that I must bring Mary in for treatments each Thursday for at least the next year. Hence, I will be unable to meet my classes on those days. In 27 years at this university, I've never taken a sick day so I'm sure I have plenty of paid leave.

A year ago, Johnson's request would have been dismissed as fanciful. Certainly there was no legal reason to give his note serious consideration. University policy did not permit the part-time leave requested by Johnson, particularly not for the purpose of transporting another person to any type of medical treatment. Moreover, the university had never recognized the opinion of any chiropractor; in fact, the university's health insurance did not even cover chiropractic treatments. Johnson could have requested an unpaid leave of absence for an entire semester (no partial semester leaves were permitted), to be granted at the discretion of the university president. No benefits would have been provided during such a leave, except that health insurance could have been continued at the sole expense of the employee.

That was all before the Family Medical Leave Act of 1993 ("FMLA") took effect on August 5, 1993.[1] The FMLA started with a simple idea that was transformed by the legislative and regulatory process into an extraordinarily complex legal mandate. The simple idea was that parents, both mothers and fathers, should be able to take time off from their jobs to care for a new-born child. But quickly other reasons for leave were added to the bill: adoption or foster placement of

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[1] Pub.L. No. 103-3, 29 U.S.C. §2601 *et seq.* Regulations were issued by the U.S. Department of Labor ("DOL") on June 4, 1993. 58 Fed. Reg. 31794, 29 C.F.R. Part 825. Section numbers appearing in the text or footnotes of this pamphlet are from 29 C.F.R. Part 825.

Note: Just prior to sending this book to the printer, the Department of Labor issued final regulations on the Family and Medical Leave Act. An update of this pamphlet, reflecting those changes, will be available from NACUA in late Spring 1995.

a child, care of a sick family member, and treatment of the employee's own illness. As the bill worked its way through Congress three times, twice to be vetoed by President Bush, a bewildering array of amendments were added, some at the urging of labor and some at the behest of business.

As finally enacted and signed by President Clinton, the FMLA requires covered employers to grant eligible employees up to 12 weeks of unpaid leave during any 12-month period for: (1) the birth and first-year care of a child; (2) the adoption or foster placement of a child in the employee's home; (3) the care of a spouse, child, or parent with a serious health condition; or (4) the serious health condition of the employee. Employers are required to maintain any preexisting health insurance coverage during the FMLA leave, provided the employee pays his or her portion of the premiums. With some exceptions, employees are entitled to return to the same or an equivalent position at the end of FMLA leave and to the unconditional reinstatement of all fringe benefits.

The concept underlying the FMLA is that contemporary American life, particularly the demands made on families in which both husband and wife work outside the home, requires new sensitivity on the part of employers to the need for leave to permit employees to care for young children and ailing family members, among other reasons. The FMLA, therefore, creates a new form of leave, which will be referred to in this pamphlet as "FMLA leave." FMLA leave exists as a matter of statutory right, and is more generous in some respects than the standard leave policies offered by many universities. How universities must integrate the FMLA with existing institutional leave policies, and how universities can harmonize the requirements of the FMLA with other federal mandates, particularly the Americans with Disabilities Act, are subjects to the explored in this pamphlet.

The pamphlet will be organized as follows. First, basic FMLA concepts will be discussed, including eligibility for FMLA leave, notice requirements, medical justification, intermittent leave, relationship of paid to unpaid leave, benefits before and after leave, reinstatement to employment, and enforcement procedures. Next, a series of hypothetical situations, including Johnson's case, will be analyzed to highlight a number of practical problems in applying the FMLA to higher education. Finally, several special issues relating to implementation of the FMLA in higher education will be raised.

Basic Concepts

The following is a discussion of the key provisions of the FMLA, particularly as they relate to higher education.

Effective Dates. The general effective date of the FMLA was August 5, 1993; however, where a collective bargaining agreement was in force on that date, the FMLA effective date is the termination date of the agreement or February 5, 1994, whichever is earlier. Implementation of the FMLA with respect to unionized employees will be discussed in Section IV of this pamphlet.

Employer Notices. Employers, including universities, must display an FMLA poster in conspicuous places on their premises. §825.300. If a university has an employee handbook desribing policies for leave, wages, and similar matters, the handbook must also include information on the FMLA. §825.301(a). The most significant notice requirement, however, is triggered when an employee requests leave under the FMLA. At that time, the university must provide the employee with a written notice stipulating the specific expectations and obligations of the employee and explaining any consequences for failing to meet these obligations. §825.301(c). A partial list of the issues to be covered in this written notice includes the need for the employee to furnish medical certification of a serious health condition, the policies with respect to the substitution of accrued paid leave for unpaid FMLA leave, the rules pertaining to health insurance premiums during leave, and the policy on requiring a fitness-for-duty certificate in order to be restored to employment. A university's failure to provide this comprehensive notice when the employee requests leave may mean that the university will lose the ability to take advantage of some of the more favorable provisions of the FMLA.[2]

Covered Employers. It appears that all public institutions are "covered employers" regardless of size. §825.108. However, in a peculiar drafting twist, staff at some small institutions, even if part of a multi-campus university, may not be entitled to FMLA leave because they do not meet the definition of "eligible employees," as described below. Private universities that have fifty or more employees on the payroll during each of twenty or more calendar weeks in the current or preceding calendar year are covered by the FMLA. §825.105. Employees on paid or unpaid leave and disciplinary suspensions, as well as part-time employees, are counted.

Eligible Employees. In order to be eligible for FMLA leave, an employee must have been employed by the university for at least 12 months (which do not need to be consecutive), worked at least 1,250 hours during the year preceding the commencement of the requested leave (the equivalent of approximately 25 hours per week for year-round employees), and currently be employed at a worksite where the university employs at least 50 employees within a 75-mile radius. §825.110(a) and (b). Accordingly, employees at small institutions (public as well as private) or at small branches of larger institutions at least 75 miles from the main campus may not be eligible for FMLA leave.[3]

On the other hand, it is not uncommon for large businesses to voluntarily extend FMLA coverage to employees working in small branch offices. In the same way, universities in such a situation should consider the policy implications of denying those employees the benefits of the FMLA while employees on the main campuses are covered. With respect to the 1,250 hour test, the DOL has determined that all full-time salaried employees who have worked for an employer for at least 12 months are presumed to have met the service requirement for FMLA eligibility. This presumption can be rebutted, however, if the employer can "clearly" demonstrate that the employee did not work 1,250 hours. §825.110(c).

Family Members. The FMLA permits employees to take leave when "needed to care for" a spouse, child, or parent. §825.113. Congress spent a considerable length of time debating these terms. The term "spouse" does not include an unmarried domestic partner, unless recognized under state law. The term "parent" does not cover parents-in-law, but it does include an individual who stood *in loco parentis* to the employee when the employee was a child. A "child" is defined as a biological, adopted, or foster child, a stepchild, a legal ward, or a child for whom the employee stands *in loco parentis*, who either is under age 18, or is 18 and older and incapable of self-care because of a mental or physical disability. Both a mother and father may take family leave for the birth or adoption/foster placement of a child. §825.112(b). However, if both the husband and wife work for the same employer, even at different worksites, their combined total of FMLA leave for birth or adoption/foster placement is 12 weeks during any 12-month period. §825.202.

Employee Notices. If the need for FMLA leave is foreseeable, employees must give 30 days advance notice. Failure to do so means that commencement of the leave may be postponed until 30 days after the notice was given, provided proper FMLA posters were displayed at the worksite. When the need for leave is not foreseeable, employees should provide notice as soon as practicable, ordinarily within one or two business days after learning of the need for leave. §§825.302-304.

Medical Justification. Deciding whether the employee, or the family member for whom the employee wishes to care, suffers from a "serious health condition" will be an ongoing problem under the FMLA. Generally, the condition must cause a disability for a period of more than three days in addition to requiring continuing treatment by a health care provider. Congress did not intend the FMLA to cover short-term conditions for which treatment and recovery are very brief because such conditions are normally covered by sick leave policies. Nevertheless, because the FMLA permits intermittent leave or reduced leave schedule (see definitions below), it is apparent that Congress contemplated FMLA leave in some cases due to conditions that currently are not disabling. Thus, the DOL regulations provide that FMLA leave may be taken for treatment of a condition which, if left untreated, would likely result in a disability of more than three days. §825.114.

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[2] Examples of such provisions include defining "any twelve-month period" (§825.200), substituting paid leave under the employer's policies for unpaid FMLA leave (§825.207), and requiring a fitness-for-duty certification before returning to work after an FMLA leave (§825.310).

[3] Even though a small public institution employing fewer than 50 faculty and staff would be a "covered employer," its employees probably would not meet the "eligible employee" test, which requires 50 employees within a 75-mile radius of the worksite.

The regulations also take a very broad view of when an employee is "needed to care for" a family member with a serious health condition. §825.116. Both physical and psychological care are covered as are situations where family members are unable to provide for their own basic medical, hygienic, or nutritional needs or safety, or unable to transport themselves for medical treatment. Also included are providing "psychological comfort and reassurance" to a family member receiving inpatient care, filling in for others caring for the family member, or making arrangements relative to care of the seriously ill family member, such as organizing the transfer to a nursing home. Intermittent FMLA leave may also be taken when the family member's serious health condition itself is intermittent or when the employee is only needed intermittently to care for the family member, such as when another family member is sharing the responsibilities for such care.

In some instances, the employer may require medical certification from a qualified health care provider prior to granting FMLA leave. §825.305. In addition to physicians, in certain situations the DOL regulations permit such certification to be provided by podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse midwives, and Christian Science practitioners. §825.118. If the employer is not satisfied with the medical certification provided by the employee's health care provider, a second and third opinion may be obtained at the employer's expense. §825.307.

Intermittent and Reduced Leave Schedule. The FMLA permits leave to be taken either on a full-time basis or on an intermittent or reduced schedule basis. Intermittent leave is leave taken in separate blocks of time rather than for one continuous period of time. §825.203(b). A reduced leave schedule is a reduction in the employee's usual number of working hours per day or week. §825.203(c). Intermittent leave or a reduced leave schedule must be granted where there is a medical necessity, such as when an employee is recovering from a serious health condition but is not strong enough to work a full schedule or when such leave is necessary to care for an ill family member. However, employers have the discretion to grant or deny intermittent leave or a reduced leave schedule for first-year care of the employee's child or for adoption/foster placement of a child in the employee's home. §825.203(a). Employees requesting intermittent leave or a reduced leave schedule must attempt to arrange it so as not to disrupt the employer's operations. §825.117. If an employee requests foreseeable intermittent leave or a reduced leave schedule, the employer may, under certain circumstances, transfer the employee temporarily to an alternative position with equivalent pay and benefits. §825.117.

Relationship of Paid and Unpaid Leave. The FMLA permits an employee to elect or an employer to require that accrued paid leave be substituted for unpaid FMLA leave under certain circumstances. §825.207. The rules governing this are extremely complicated and should be reviewed carefully when a situation arises. In general, employers have an interest in reducing the total time that an employee may be absent from work. To accomplish this, many employers require employees to substitute, when the DOL regulations permit, any accrued paid leave for the unpaid FMLA leave. This may prevent an employee from exhausting all paid leave under the employer's policies and then taking the full 12 weeks of unpaid FMLA leave. If the employee has accrued paid vacation, personal, or family leave, the employer may require or the employee may elect to substitute such accrued leave for all or part of any FMLA leave. Similarly, the employer may require or the employee may elect to substitute any accrued paid sick leave for FMLA leave taken due to the employee's own serious health condition. In general, the substitution of paid for unpaid leave can be made only when the employee discloses to the employer that paid leave is being requested for an FMLA purpose. §825.208.

Benefits During and After FMLA Leave. The university must maintain the employee's coverage under any group health plan (medical, substance abuse, mental health, dental, and vision) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave. §825.209. If the employee fails to pay his or her share of the premiums (assuming active employees must contribute toward their health insurance premiums), the university has the option of canceling the insurance or of paying the employee's share and recouping it after the employee returns to work. If the employee declines health insurance coverage during FMLA leave, the employer may cancel the coverage, but must then reinstate it unconditionally when the employee returns to work. Even if the institution's insurance carrier does not permit automatic reinstatement of benefits, the institution may still be responsible for ensuring that the employee has the same health benefits as similarly-situated employees who did not take FMLA leave.

If the employee fails to return to work, or returns but fails to stay for 30 calendar days, with some exceptions the employer may attempt to collect from the employee all health insurance premiums paid during the FMLA leave including the employer's share. §825.213. Other types of employee fringe benefits, such as life insurance, disability insurance, employee assistance programs, tuition reimbursement, and employer annuity contributions, may be discontinued during FMLA leave in accordance with the employer's policies, but must be reinstated immediately upon the employee's return to work. §825.215(d)(3). The benefits must be resumed at the same level as provided when the leave began, subject to any changes in benefit levels affecting the entire work force that may have taken place during the FMLA leave. §825.215(d)(1).

Return to Work. With some exceptions discussed below, an employee returning from FMLA leave is entitled to reinstatement in the same or in an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. §§825.214-215. However, if certain requirements are met, the university may deny reinstatement until an employee has submitted a fitness-for-duty certification. §825.310. Reinstatement may also be denied if the university can prove that the employee would have been laid off due to a bona fide reduction-in-force during the FMLA leave. A further reason to deny reinstatement is when the university can establish that the employee had been hired for a specific term that has expired, or only to perform work on a defined project that has been completed, and the university would not have continued to employ that person even if he or she had not been on FMLA leave. Certain "key employees" may also be denied reinstatement under specific conditions, as described more fully in the following sections of this pamphlet.

Enforcement. Eligible employees denied FMLA leave, or denied reinstatement at the end of leave in violation of the FMLA, may lodge a complaint with the DOL or file a private lawsuit against the employer to obtain damages and other relief. Damages may include lost wages, interest, liquidated damages equalling lost wages and interest, reinstatement, and reasonable attorneys' fees. §§825.400-404.

Hypothetical FMLA Situations in Higher Education

Hypothetical 1: Professor Johnson

Johnson's case was described in the Introduction to this pamphlet. To recap, he requested intermittent paid leave to take "Mary" to chiropractic treatments on one of the two days each week his classes meet.

Discussion

1. *Is Johnson an "Eligible Employee"?* An alert university administrator might ask whether Johnson fulfills the threshold FMLA requirement of working 1250 hours during the previous 12

months. He was on campus 36 weeks and had a total of 14 classroom and office hours per week. In the last 12 months, he filed a successful application for a small humanities grant but published no papers. He served on two university committees which had a total of eight meetings. He was the advisor to four graduate students.

Despite the possibility that Johnson's working time might fall below the FMLA threshold of 1250 hours, the DOL has determined that "in consideration of the time spent at home reviewing homework and tests, full-time teachers in ... institutions of higher education ... are deemed to meet the 1250 hour test." §825.110(c). It is possible to deny FMLA leave to a full-time faculty member, but the university "must be able to *clearly* demonstrate that such an employee did not work 1250 hours during the preceding 12 months." §825.110(c) (emphasis added). Doing so could be agonizing and create untold ill-will with the faculty.

2. Is Johnson a "Key Employee"? Considering Johnson's seniority at the university, he may be in the top 10% of all employees in terms of compensation, particularly using the FMLA method of dividing year-to-date earnings by the weeks actually worked by the employee. §825.217. If he meets these criteria, the FMLA classifies Johnson as a "key employee," and permits the university not to reinstate him after his FMLA leave if the university can establish that his reinstatement (not his absence from the university during FMLA leave) will cause "substantial and grievous economic injury" to the university. §825.218. However, the prospects of successfully using the "key employee" exception to deny Johnson reinstatement are dubious at best. Even if the conceptual problems of applying the exception to an employee taking leave on an intermittent basis could be overcome, it is not clear that the university could ever establish that the reinstatement of Johnson would cause "substantial and grievous economic injury."

3. Who is "Mary"? If she is Johnson's mother, wife, or daughter (provided she meets the definition of "child"), then he is permitted to take FMLA leave to transport her for necessary medical treatments. But if Mary is Johnson's sister, mother-in-law, unmarried domestic partner, professional colleague, or other friend or relative, then the FMLA would not require the university to grant him leave for her medical treatments. For the remainder of this analysis, it is assumed that Mary is Johnson's wife.

4. Is the Chiropractor a Qualified Provider? This hypothetical indicated that Mary's chiropractor had prescribed the treatment for which the leave is requested. Congress left the definition of the term, "health care provider," to the Secretary of Labor. In the DOL regulations, chiropractors are included within the definition, but only with respect to "treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist." §825.118(b)(1). The university may require Johnson to obtain a written certification from the chiropractor of Mary's serious health condition.[4] §§825.305-306 and 311. If the diagnosis is outside the chiropractor's allowed area of expertise, the leave may be denied. Even if the diagnosis is within the DOL regulation, the university may require second and third medical opinions, at the university's expense. §825.307

5. Is Johnson Eligible for Intermittent FMLA Leave? Johnson requested leave on an "intermittent" basis; that is, one day per week. FMLA leave on an intermittent basis is permitted in order to transport a family member to medical treatments when the family member needs such assistance. §825.116. However, employees requesting intermittent FMLA leave "must attempt to schedule their leave so as not to disrupt the employer's operations." §825.117. The university certainly has a right, therefore, to require that Johnson schedule Mary's treatments on one of his non-class days. If Johnson is unable or unwilling to do this, the university has the right to assign him to an "alternative position with equivalent pay and benefits that better accommodates the employee's intermittent basis or a reduced leave schedule." §825.117. For example, he could be assigned freshman sections that meet at 8:00 a.m. on Mondays, Wednesdays, and Fridays. The practical and political consequences of such an assignment would have to be evaluated on a case-by-case basis.

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[4] The DOL suggested a certification form at 58 Fed. Reg. 31837-38 (June 4, 1993).

6. How Much Intermittent FMLA Leave May Johnson Take? When FMLA leave is taken on an intermittent or reduced leave schedule, only the time actually taken as FMLA leave may be charged against the employee's 12 weeks of FMLA entitlement. If Johnson takes FMLA leave intermittently one day per week, he would use only one-fifth of a week of FMLA leave per each work week. Accordingly, he could follow this schedule (assuming Mary's chiropractic treatments remain medically necessary and she is unable to transport herself there) for an entire year and still not exhaust all of his FMLA leave entitlement. §825.205.

7. Is the Leave Requested by Johnson Paid or Unpaid? While the FMLA provides only the right to take unpaid leave, each university must look to its own policies and practices to determine whether FMLA leave in any particular case will be paid or unpaid. Unlike faculty in elementary and secondary schools, university faculty members usually are not eligible for any particular number of sick days per year; nor are they necessarily subject to any specific limitations on their use of sick days. However, if there is no university policy or practice permitting faculty to take intermittent days off for family members' medical treatment without loss of pay, then there is no requirement under the FMLA that such leave be paid. On the other hand, the FMLA does not supersede or discourage more generous leave provisions contained in employer policies, collective bargaining agreements, or state laws. §825.700. Accordingly, if the university already permits faculty to take days off with pay for family members' medical treatments, then Johnson would be entitled to do the same because the FMLA does not alter or supersede such policies.

8. Summary. If Johnson's wife, Mary, has a medical need for spinal manipulation treatments by a chiropractor and cannot transport herself to the chiropractor's office, then Johnson would be entitled to intermittent FMLA leave for that purpose. Assuming he uses one day per week, he could continue this leave for an entire year. However, Johnson would have to make every reasonable effort to arrange Mary's treatment on a day when he does not have class or accept an "alternative position" which better accommodates the requested leave. The question of whether such leave will be paid or unpaid will depend on his university's policies and practices with respect to such matters.

Hypothetical 2: Vice President Smith

Joyce Smith is the university's executive vice president for business and finance. She recently took eight weeks of unpaid leave to care for her ill mother-in-law who, lives in the Smith home. Upon returning to work, it was apparent that she was pregnant. Several weeks later, she informed the university president as follows:

> The baby is due in two months. Starting Monday, I will use my accrued vacation and sick leave (about eight weeks), then take four months of unpaid maternity leave guaranteed under state law. After that, I will take 12 weeks of unpaid leave for first-year child care provided by the FMLA. I expect to resume my duties as Executive Vice President for Business and Finance when I return to work in about nine months.

Discussion

1. Is Smith an "Eligible Employee"? One issue to consider when analyzing this hypothetical is to determine whether Smith will have worked 1250 hours in the 12 months immediately prior to the FMLA leave she has requested. If she has already taken eight weeks of leave to care for her mother-in-law and proposes to take another eight weeks of accrued vacation and sick leave followed by four months of maternity leave, she may not meet the threshold requirement for FMLA eligibility.

2. Is Smith a "Key Employee"? The discussion above in Hypothetical I pertaining to the FMLA exception for key employees is also pertinent here.

3. Does the Eight Weeks of Leave Already Taken by Smith Count Against Her 12 Weeks of FMLA Eligibility? It is tempting to say that Smith has already taken eight weeks of family leave and is, therefore, not entitled to take the full 12 weeks of FMLA leave to care for her child after the birth. However, even though her university permitted her to take this time off, care for a parent-in-law is not covered by the FMLA. §825.113(b). Accordingly, such leave does not result in a deduction of the 12 weeks of eligibility of leave under FMLA.

4. *Does Taking Eight Weeks of Accrued Vacation and Sick Leave Count Against the 12 Weeks of FMLA Leave Eligibility?* The university may require or the employee may elect to substitute certain forms of paid leave for unpaid FMLA leave. Many employers include as a part of their FMLA policy a requirement that, where permitted under the FMLA, accrued paid leave must be substituted for unpaid FMLA leave. This is to prevent employees from taking various types of paid leave for FMLA purposes and then tacking on the full 12 weeks of unpaid FMLA leave. The regulations pertaining to the substitution requirement, however, are somewhat complicated and should be consulted in detail when such a situation arises.

Even if the university has adopted a requirement that paid leave must be substituted for unpaid FMLA leave, that does not provide the full answer as to whether Smith's eight weeks of accrued vacation and sick leave count against the 12 weeks of FMLA leave eligibility. Because Smith's baby is not due for about two months, it is unlikely that she will be suffering from a "serious health condition" when she begins using her accrued vacation. Accordingly, until she becomes disabled (a condition which would not allow her to work), she is not taking leave for an FMLA purpose and the substitution requirement would be inapplicable. However, at some point (presumably a week or two prior to the baby's due date), Smith would become disabled. Any paid leave taken after that point would be for an FMLA purpose and the substitution requirement could be applied.

5. *What is the Relationship of FMLA to State Maternity Leave Laws?* The FMLA does not supersede state laws providing more favorable leave entitlements. §825.701(a). Maternity leave is probably the prime example of this because many states have laws requiring employers to grant more than 12 weeks of leave for pregnancy, child birth, and any related complications. However, if the type of leave requested constitutes an entitlement under both state law and the FMLA, "the leave used counts against the employee's entitlement under both laws." §825.701(a). That is, Smith would concurrently exhaust her entitlements under both the state maternity leave law and the FMLA. In this hypothetical, if Smith takes four months of maternity leave under state law, this would probably also exhaust her 12 weeks of FMLA leave entitlement.

6. *How Does the University Define "Any 12-Month Period" under the FMLA?* An important, but somewhat esoteric, consideration in analyzing this case is how the university, as a matter of policy, has defined the term "any 12-month period." When Congress enacted the FMLA, it stated that eligible employees were entitled to 12 weeks of FMLA leave during "any 12-month period." 29 U.S.C.2612(a)(1). However, Congress never defined this term. Accordingly, the DOL regulations state that employers are allowed to choose one of several methods to compute the 12-month period from various alternatives, including a fixed 12-month period for all employees, 12 months measured forward from the first date leave is used, or a rolling 12-month period measured backward from the date leave is used. §825.200. In its discussion of the regulations, the DOL stated that the last option "is the only one which clearly would not allow 'stacking' of back-to-back leave entitlements, and seems clearly to be permissible under the plain meaning of the statutory language." Thus, many employers have adopted this particular definition of the term "any 12-month period." If the university in this case has so defined the term, then it would not have to permit Smith to take 12 weeks of FMLA leave after taking four months of maternity leave under state law. However, if the university defined "any 12-month period" in some other manner, such as a calendar year, then it is possible that Smith would have some FMLA entitlement even though she took four months of maternity leave under state law. This would depend on how the university defined "any 12-month period" and when her requested FMLA leave was to commence. Such a definition must be made when the university establishes its FMLA leave policy, and the university must

apply the same definition for all FMLA leave requests.

7. *Summary*. This hypothetical is primarily useful in analyzing the circumstances under which an employee would exhaust entitlement to FMLA leave. First, the leave taken by Smith to care for her ill mother-in-law would not exhaust her FMLA entitlement because in-laws do not fall within the definition of "parent" in the FMLA. That is, if Smith had been caring for an ill parent rather than a parent-in-law this eight weeks of leave would count against her FMLA entitlement. Second, the eight weeks of accrued vacation and sick leave would not start to count against her FMLA entitlement until she needed prenatal care or was disabled from working. §825.112(c). This assumes that the university has adopted a policy requiring employees to substitute various forms of paid leave for unpaid FMLA leave. Third, leave taken under state maternity leave laws would count against FMLA entitlement. Thus, if Smith took 12 weeks or more of leave under a state maternity leave law, she would completely exhaust her FMLA leave, at least during the same "12-month period" (as defined by the university).

Hypothetical 3: Janitor Jones

Randy Jones worked as a janitor in the university's residential life division. He injured his back during a softball game at a family reunion. Because he was unable to work, he requested FMLA leave. He had no accrued vacation or sick leave. He declined health insurance coverage and all other fringe benefits while on leave because he could not afford to pay premiums, so all coverages were canceled. After ten weeks of FMLA leave, Jones told his supervisor that he was ready to return to work. The university told Jones to get a "fitness-for-duty" certification as a condition for returning to work and reinstating his health insurance. Jones then submitted the following note from his physician:

> Randy has not fully recovered from his collision with third base. He has also recently developed a heart condition which is being treated with medication. I am limiting him to no more than six hours of light duty work per day for the next six months.

The director of residential life then wrote to Jones as follows:

> Your former job was for eight hours, not six, so I can't use you anymore, especially with your doctor's light-duty restriction. Besides, Human Resources has told me that due to your heart condition, you will not be eligible for the university's health insurance again for 12 months. You can't work here without health insurance.

Discussion

1. *May the University Cancel Jones' Health Insurance and Other Benefits While He is on FMLA Leave?* The university must maintain Jones' health insurance during FMLA leave provided that Jones is willing to continue to pay his share of the premiums. Employees unwilling to do so may choose not to retain health insurance coverage during FMLA leave. §825.209(e). However, the university must be extremely careful about canceling the insurance in such a situation because when Jones returns to work he is entitled to full reinstatement of his health insurance without any waiting period, physical examination or new pre-existing condition exclusions. Unlike health insurance, other types of insurance fringe benefits such as term life insurance and disability insurance, even if fully paid by employees, may be dropped during FMLA leave provided the university does not have "more generous leave policies" requiring the maintenance of such benefits. §§825.215(d)(3) and 825.700(b). However, as with health insurance, these types of coverage must be reinstated unconditionally as soon as the employee returns to work after FMLA leave.

2. *May the University Require Jones to Obtain a "Fitness-for-Duty" Certification Before Returning to Work?* Jones may be denied restoration to employment until he submits a fitness-for-duty certification, provided that the university has met certain requirements. §825.310. For example, the university must have a "uniformly-applied" policy of requiring all employees who take leave for similar conditions to submit such certification. Such a policy may be based on the nature of the illness or the length of the absence. §825.310(a). Also, the employee must receive specific notice at the time leave was requested that a fitness-for-duty certification would be required prior to returning to work. On the basis of this hypothetical, it is not clear whether the

university had a "uniformly-applied" policy or whether Jones, when he requested leave, was informed that such a certification would be required. Regardless, the fitness-for-duty certification cannot be used as a precondition for reinstating Jones' health insurance except to the extent that the failure to submit such certification prevents an employee from returning to work. As mentioned above, reinstatement of one's health insurance is unconditional upon returning to work.

3. Is Jones Entitled to Return to Work on a Six-Hour Schedule? The FMLA permits leave to be taken on a "reduced leave schedule." §§825.116(c) and 825.800. Although the need for a reduced leave schedule appears to be based, at least in part, on a heart condition developed after Jones commenced FMLA leave, that would have no impact on his eligibility for a limited working schedule. However, he has already taken 10 full weeks of FMLA leave, so he is only entitled to 80 more hours of FMLA leave. (This assumes the university has defined "any 12-month period" to prevent Jones from "stacking" his FMLA leave.) Accordingly, Jones would be eligible to work six hours per day for eight weeks before exhausting all FMLA entitlement for the current "12-month period." Of course, Jones would be entitled to only six hours of wages per day, not eight hours, while working on a reduced schedule.

4. What Happens When Jones Exhausts All FMLA Leave Entitlement? The hypothetical indicates that Jones' doctor requested six hours of light-duty work per day for the next six months, but all FMLA entitlement is exhausted after eight weeks. At this point, the university's obligations are not determined by the FMLA, but rather by the Americans with Disabilities Act (ADA). §§825.215(b) and 825.702(b). In this regard, assignment of "part-time or modified work schedules" is one of the principal examples of reasonable accommodation described in the *ADA Technical Assistance Manual* released by the U.S. Equal Employment Opportunity Commission on January 27, 1992 (§3.5). Whether an employer is required to provide a part-time or modified work schedule is a matter to be decided based on the particular facts and circumstances of the case.

5. What About the Request for Light-Duty Work? This is also not an FMLA issue, although it is likely to arise with some frequency following FMLA leaves. The ADA requires that the employee must be able to perform the "essential functions" of the position with or without a "reasonable accommodation." One example of a reasonable accommodation described in the *ADA Technical Assistance Manual* is "restructuring a job by reallocating or redistributing marginal job functions." The university's obligation to provide Jones with light-duty work under the ADA, therefore, would depend upon the specific facts of the situation.

6. May a Health Insurance Waiting Period be Imposed for a New Medical Condition Detected While Coverage Was Discontinued at the Employee's Request? All fringe benefits must be reinstated unconditionally when the employee returns to work. Even if an employee developed a new health condition during an FMLA leave, the health insurance must be reinstated without any new exclusions for pre-existing conditions as soon as the employee returns to work. This again raises the question of whether an employer should ever cancel health insurance during an FMLA leave, even when the employee specifically declines such coverage or elects coverage but fails to pay his or her share of the premiums.

7. Summary. Jones is entitled to the unconditional reinstatement of his health insurance when he returns to work. At least for the first eight weeks after returning to work, Jones is entitled, under the FMLA, to work a six-hours-per-day schedule. Once he has exhausted all FMLA entitlement, however, the university's obligation to provide part-time work will be governed by the ADA. The result will depend upon whether Jones can perform the "essential functions" of his position and whether the part-time schedule and the light-duty restriction are "reasonable accommodations" under all of the circumstances of the situation.

Special Issues

This section is devoted to several key problems that may arise as the FMLA is implemented in higher education.

Unionized Employees. The FMLA effective date for employees subject to collective bargaining agreements is February 5, 1994, six months later than the general effective date. According to the DOL, this is because Congress "contemplated that collective bargaining agreements will be amended to conform to FMLA during the extended effective date." §825.700(c). This raises some interesting issues relative to implementing the FMLA for unionized university employees. Clearly, on February 5, 1994, unionized employees were entitled to all FMLA rights regardless of whether or not their collective bargaining agreements had been amended by that date. However, it is far less clear whether the university could take advantage of some of the FMLA's pro-management options (e.g., the definition of "any 12-month period" and substitution of paid for unpaid leave). The university's obligation, if any, to bargain on these issues with the unions is determined, not by the FMLA, but by the National Labor Relations Act for private universities, and by state labor laws for public universities. The question, then, is whether, under the pertinent statute and case law, the various provisions of a university's FMLA policy affect the"terms and conditions of employment" in a way that would make those provisions mandatory subjects of bargaining.

Based on their interpretation of the law, universities may take a variety of approaches in implementing the FMLA with respect to unionized employees. Some universities have done nothing about adopting an FMLA policy or amending existing collective bargaining agreements on the grounds that any requests for FMLA leave from unionized employees will simply be handled in accordance with the FMLA regulations. This is probably a poor strategy, because it leaves the university open to simultaneous charges that it has failed to comply with the FMLA and to negotiate mandatory bargaining subjects with the union. Another approach would be to adopt an "interim" FMLA policy and notify the union that a final policy will be negotiated during the next regular round of bargaining. Still another approach would be to adopt an FMLA policy and invite the union to engage in "impact bargaining" over any terms and conditions of employment affected by the policy. Yet another approach would be to engage the union in active negotiations over the details of an FMLA article to be added to the existing collective bargaining agreement. The final decision on which strategy to adopt should be made only after careful consultation with labor counsel.

Academic Year Work Schedules. Many university employees work on an academic year schedule and have the summer months off. This can pose several issues under the FMLA. The first is whether such a schedule affects the employee's eligibility for FMLA leave. As discussed in Section II, one of the requirements for an FMLA-eligible employee is to work 1250 hours during the year preceding the beginning of the requested leave. For hourly (or so-called FLSA non-exempt) employees, having the summer months off might indeed jeopardize their FMLA eligibility, depending on their working schedule during the academic year (e.g. a six-hour work day during the academic calendar would probably result in less than 1250 hours of work per year). Full-time salaried (FLSA-exempt) employees, on the other hand, are "presumed" to satisfy the 1250-hour test. §825.110(c). This is true even for faculty, many of whom work on an academic year calendar.

Another FMLA issue that may arise with respect to the academic year work schedule is how the summer months will be counted towards the 12 weeks of FMLA leave entitlement. For example, if an academic year employee has a baby in July, will the period of hospitalization and the time spent caring for the baby during the summer months count against the 12 weeks of FMLA entitlement? Although the DOL regulations do not address this specific point, it appears that time devoted to FMLA-qualifying events during a part of the year the employee is not otherwise scheduled to work would not count against the 12 weeks of FMLA entitlement. The same result would ensue if the FMLA-qualifying event occurred relatively late in the academic year and the employee was on FMLA leave when the summer break began, i.e., only the time out of work prior to the normal summer break would count toward the 12 weeks of FMLA entitlement.

"Key Employee" Exception. As discussed above in connection with Professor Johnson's case, the FMLA contains a special provision which, under certain circumstances, permits an employer not to reinstate a highly-compensated employee at the conclusion of FMLA leave. There is a some skepticism, however, that this exception has been so narrowly drawn by Congress and the DOL that the chances of ever utilizing it successfully are remote. To do so, the university would have to maintain a running tabulation of the top 10% of its employees in terms of compensation. An employee on that list requesting FMLA leave would have to be notified at the time of his or her request that he or she is classified as a key employee, and could possibly be denied reinstatement at the conclusion of the FMLA leave. As soon thereafter as the university actually determines that reinstatement of the key employee would cause "substantial and grievous economic injury" to the university, the employee must be so notified and given the option of discontinuing the FMLA leave and returning to work. Thus, even if the university could establish the level of economic injury to the institution necessary to deny reinstatement, the "key employee" could avoid the consequences by simply returning to work at that time. If the employee chooses not to return immediately, he or she may still request reinstatement at the end of the FMLA leave. The university "must then determine whether there will be substantial and grievous economic injury from reinstatement based on the facts at that time." §825.219(d).

It is expected that universities will rarely, if ever, be able to demonstrate the degree of economic injury necessary to deny reinstatement to employment, particularly when such injury must be caused by the reinstatement of the "key employee," not by his or her absence during the FMLA leave. Accordingly, universities should carefully consider whether it even makes any

sense to include a "key employee" exception in their FMLA policy.

Substitutions of Paid Leave for Unpaid FMLA Leave. The rules governing how an employer may implement its requirement that various types of paid leave be substituted for unpaid FMLA leave are very complex. §825.207. A question that frequently arises is whether time out of work on a short-term disability plan or workers' compensation counts against the 12 weeks of FMLA leave entitlement. Some universities have short-term disability plans which, after an employee has exhausted accrued sick leave, provide payments for a period of weeks or months at a percentage of the employee's salary or wages. The DOL is relatively clear in its interim regulations that an employer may require an employee to substitute paid leave for unpaid FMLA leave "under a plan covering temporary disabilities." §825.207(c)(2). But the DOL regulations do not address the question of employees out of work and receiving workers' compensation benefits. In response to telephone inquiries, the DOL is currently taking the position that a condition qualifying an employee for workers' compensation under state law would almost always satisfy the FMLA definition of "serious health condition." This may have an interesting, and potentially far-reaching consequence. It means that if an employee out of work on workers' compensation benefits seeks to return to work before exhausting the FMLA entitlement, the employer will be required to offer reinstatement even if state law does not otherwise guarantee job restoration to an employee who has been out of work due to a work-related illness or injury. Further guidance may be forthcoming when DOL issues policy interpretations and final regulations.

Deductions from Compensation of Salaried Employees for Intermittent FMLA Leave. Universities must be extremely careful about making deductions from the compensation of salaried employees because of the risk of losing the overtime exemption under the Fair Labor Standards Act ("FLSA"). DOL regulations are very strict about such deductions. In general, deductions may be made only for absences of a day or more if the employee is absent for personal reasons, or for sickness or accident and has exhausted all sick leave under a "bona fide" sick pay plan.[5] 29 C.F.R. §541.118. Accordingly, with certain exceptions, deductions may not be made from the compensation of a salaried employee who is absent for only a portion of a day or who is absent for a day or more for sickness or accident, and who does not have any sick leave plan. The FLSA notwithstanding, the FMLA contains a special provision permitting employers to make salary deductions for FMLA leave taken intermittently or on a reduced leave schedule. 29 U.S.C. §2612(c). Universities should be careful, however, in researching whether or not laws in their particular states would in fact permit such deductions.

Relationship of the FMLA and the ADA. The hypothetical involving Janitor Jones illustrated several types of interplay between the FMLA and the ADA. There will probably be many instances when an employee will return to work from an FMLA leave (either because all FMLA entitlement has been exhausted or the employee's health condition has significantly improved) and request a reduced working schedule, light-duty assignment, or some other type of "reasonable accommodation." At this point, the university will need to analyze whether the employee is a "qualified person with a disability" and whether he or she can perform the "essential functions" of the position with the requested reasonable accommodation. There is also the issue of whether the requested accommodation is an "undue hardship" on the university. These are all fact-specific determinations that can only be made at the time the issue arises. Nevertheless, it is entirely possible for an employee to utilize the ADA to parlay an FMLA leave into an extended period of part-time or light-duty work. In order to ensure compliance with both laws, university administrators should become familiar with the relationships between the university's obligations under the FMLA and under the ADA.

Accrual of "Service Credit" in Pension Plans While on FMLA Leave. A question arises whether DOL has properly interpreted the FMLA with respect to employees earning "service credit" under pension and retirement plans while on FMLA leave. The FMLA itself states that taking leave "shall not result in the loss of any employment benefit accrued *prior* to the date on which the leave commenced." (Emphasis added.) 29 U.S.C. §2614(a)(2). Further, the FMLA states that nothing in the law "shall be construed to entitle any restored employee to ... the accrual of any seniority or employment benefits during any period of leave." 29 U.S.C. §2614(a)(3). The issue arose because the DOL regulations state: "With respect to pension and other retirement plans, any period of FMLA leave will be treated as continued service (i.e., no break in service) for purposes of vesting and eligibility to participate." §825.215(d)(4). Many pension plan administrators have written to the Secretary of Labor, arguing that the DOL has misinterpreted the FMLA. It is expected that the DOL will revisit this issue when it publishes additional interpretations.

Final Thoughts

It should be apparent from reading this pamphlet that the FMLA is anything but a simple piece of legislation. In fact, the statute and the implementing regulations constitute a surprisingly complex, and even formidable, set of legal requirements. Complying with all of them will not be a passive activity. In shaping a university's FMLA policies and administering its procedures, there are no short-cuts, no "plan in the can" forms that will meet every institution's needs, and no substitutes for a thorough understanding of the law and the regulations. Yet, as always, conscientious administrators and attorneys in higher education will gradually master the issues and move their institutions into FMLA compliance.

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[5] It is beyond the scope of this pamphlet to discuss all of the issues pertaining to salary deductions for exempt employees. For example, there have been recent developments regarding deductions for short personal absences of exempt employees in the public sector. 29 C.F.R. §541.118 (a) (6). Competent legal advice should be sought if such an issue arises.

Employer Health Coverage for Domestic Partners—Identifying the Issues

Linda M. Laarman

Several well-known companies now offer employees the opportunity to provide health coverage to gay, lesbian, or opposite-sex domestic partners, and others are considering doing so. This article examines the practical, tax, and other legal issues that employers need to consider as they make decisions about this benefit. Issues include the criteria that employees and their domestic partners must meet in order for coverage to be available, the cost of coverage, and how coverage is taxed in different situations.

For several years, gay and lesbian rights advocates, several unions, and other organizations such as the American Civil Liberties Union (ACLU) have actively supported the extension of health and other benefits coverage to domestic partners.[1] And a growing number of private-sector employers—Viacom, MCA, Levi Strauss & Co., and Lotus Development Corporation, to name a few—have joined a similarly growing number of public-sector employers in offering such health plan coverage. This trend is likely to continue unless there is a radical shift on a national level in the source and cost of employee health plan coverage.

This article explores a number of the issues involved in extending employer-sponsored health coverage to domestic partners.

THE ORIGINS OF DOMESTIC PARTNER COVERAGE

Domestic partner coverage at the private-sector level is generally perceived as an outgrowth of such coverage at the governmental employer level.[2] For example, the cities of Berkeley and West Hollywood, California, have made domestic partner coverage available since 1985. A large number of other California and West Coast governments, together with several governments elsewhere, now also make it available.

In some cases, the availability of domestic partner health plan

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coverage from these governmental employers has been coupled with, or preceded by, laws that extend other rights to domestic partners. For example, some cities now allow individuals to register as domestic partners and thereby create certain legal support obligations (for example, for shelter and food) between them. In addition, most states prohibit discrimination on the basis of marital status, and a few states and several local governments prohibit discrimination on the basis of sexual orientation. (There is no such federal law.)

However, although a survey of all possibly applicable state and local laws has not been made for purposes of this article, there do not appear to be any laws requiring private sector employers to extend benefits coverage to domestic partners. Moreover, few—if any—laws encourage private-sector employers to cover domestic partners through tax or other incentives.[3]

Similarly, to date, there have been no far-reaching court decisions holding that domestic partners are entitled to employee benefits. Two pending cases may have somewhat of an impact, however. In *Gay Teachers Association v. New York City Board of Education*, the plaintiffs are arguing that, based on a New York City ordinance and school board policy, health benefits should be granted to domestic partners of gay and lesbian teachers. In *Rovira v. AT&T*, the domestic partner of a deceased employee is arguing that certain sickness and death benefits should have been received by her.[4]

WHY OFFER DOMESTIC PARTNER COVERAGE?

There are several, interrelated reasons why employers have been persuaded, or have acknowledged on their own, that health and other benefits coverage should be extended to domestic partners.

The first is societal. Compared to decades past, it is now both more common and more acceptable for unmarried individuals to be involved in relationships akin to that of a family (involving children, in many cases). This is true for both heterosexuals and homosexuals. (It should be noted, however, that homosexual couples are not allowed in any state to legally marry or to be recognized as common-law spouses.)

Second, there is greater recognition of the fact that family-type units composed of domestic partners and their children have not typically been able to enjoy the package of employee benefits provided to traditional families. In addition to health benefits, pension plans typically provide benefits to spouses, and sometimes children, that are not available to beneficiaries unrelated to employees. Special life and other types of insurance may be provided to spouses and children.

Family and bereavement leave may be available when a traditional family member is sick or has died but not when a nontraditional family member is involved. Travel and moving expenses may be subsidized for a traditional family member but not for others.

Third, the value of employee benefits keeps growing. Benefits make up an increasingly large share of an employee's total pay. Most larger employers have to offer an attractive benefits package to compete for quality employees.

Finally, employers have become more accepting, if not outright advocates, of the concepts of diversity among, and civil rights for, employees. Many employers that now make employee benefits available to domestic partners have preceded or coupled such availability with a policy granting equal employment opportunity to, and prohibiting discrimination against, individuals, regardless of marital status or sexual orientation.

DETERRENTS TO COVERAGE

By far, the biggest deterrent for employers with respect to the extension of health plan coverage to domestic partners is cost. Although some employers have expanded their leave, travel, and relocation expense policies and other "minor" employee benefits to cover domestic partners, a smaller number have extended health and pension benefits, because of concern that these benefits would be too costly. Insurance companies and health maintenance organizations (HMOs) also have been reluctant to become involved in providing health benefits to domestic partners because of cost issues.

Cost issues center around two related concerns. The first is that employees will abuse the option of domestic partner coverage by portraying a sick friend to be a domestic partner, even though the relationship between the employee and the friend is not equivalent to that of spouses. Concerns about such "adverse selection" or "fraud" are considered unfounded by domestic partner benefits advocates, however. They argue that employers that have already extended coverage to domestic partners have reported no cases of abuse and, further, that when concerns about fraud extend to gay and lesbian partners, the social stigma attached to homosexuality makes homosexual "marriages of convenience" unlikely.[5]

In addition, employers can, and typically have, addressed these concerns by requiring the employee and domestic partner to certify to certain facts—for example, that they have lived together for some period of time and intend to continue living together indefinitely, that they own property in common, and that they view their relationship as equivalent to that of spouses. If the individuals reside in a municipality that allows domestic partners to register as such, certification might be tied into the conditions for registration. Employers also may prohibit an employee from enrolling a second domestic partner for a certain period of time after the employee has been "divorced" from a first domestic partner.

The second concern about cost involves AIDS. Employers and insurance companies are concerned that if gay employees are allowed to cover their partners, the plan will be covering more individuals with the potential of contracting AIDS, an expensive disease. Critics argue, however, that the cost of other treatments—for heart disease, cancer, and the birth of a child, for example—may be equal to or more expensive than that of treating AIDS, even if measured from the point at which an individual is diagnosed as HIV-infected. Further, they say, lesbian partners, who may avail themselves of domestic partner benefits in the same or greater numbers than gay male partners, are at very low risk when it comes to AIDS. And heterosexual domestic partners have the same risk as heterosexual married couples.

Notwithstanding these arguments against the AIDS cost issue, insurance companies and HMOs continue to be conservative. Some have been willing to provide benefits for domestic partners, but only in exchange for a surcharge to premiums. In some instances these surcharges have been dropped after a few years of experience with domestic partner coverage, and costs proved lower than expected.[6]

Larger employers, which tend to self-insure and to have a greater number of employees among whom risks are spread and thus are better prepared for the occasional catastrophic risk, are likely to be somewhat less concerned about cost than smaller employers. Larger employers that offer domestic partner coverage may, nevertheless, have a problem obtaining stop-loss, minimum premium, or other "excess" coverage (i.e., any type of true insurance coverage above the amount that is self-insured by the employer) or in obtaining coverage under HMOs, at least without a surcharge. For these reasons, larger employers that offer employees with traditional families a choice among a variety of health plan options (for example, a self-insured indemnity plan and two HMOs) sometimes have limited domestic partners' choices to only those one or two options in which problems with an excess coverage insurer or HMO can be mitigated.

Smaller employers, which historically have not self-insured but instead have purchased health coverage from an insurer, have a more difficult time than larger employers in providing domestic partner benefits, because of insurers' cost concerns. A related issue is that insurers often engage in individual underwriting (assessing the health risk of each potentially insurable individual) in issuing insurance to smaller employers. This practice could result in a rejection of coverage for an individual domestic partner or for the entire group. Sometimes, smaller employers that have been unable to cover domestic partners under their group insurance policies for these reasons have allowed domestic partners to buy individual policies, with the employer then subsidizing the cost.

It is possible that long-term experience will replicate what appears to be short-term experience so that, in a few years, employers, insurance companies, and HMOs will be comfortable that the cost of coverage for domestic partners is no more than the cost for traditional families. In addition, two other factors tied in with the possibility of national health reform may lessen concerns. The first, which generally will affect small employers more than large ones, is the prospect of buying pools, under which a number of employers will be able to collectively purchase insurance. The greater number of individuals in the pool will decrease risk volatility and, therefore, perhaps the cost of coverage. The second, which could affect both large and small employers, but is likely to have a greater impact on small employers, is the prospect that individual underwriting will be prohibited for group insurance and that "community rating" (a type of experience-rating that takes into account all individuals in a buying pool or even larger group) will be required.

Beyond cost issues, the major deterrent to domestic partner coverage is a concern about backlash. The fear is that shareholders may sell their stock or raise problems at shareholder meetings or in proxy voting, that customers may boycott the employer's products (although some employers that have extended health coverage to domestic partners have reported the opposite reaction), and that employees may vocalize concerns about their health plan costs going up because of domestic partner coverage. An employer considering domestic partner coverage should analyze how genuine these concerns are and consider the public- and employee-relations campaigns it could mount to avoid problems.

TAX ISSUES

The IRS has not addressed the tax treatment of domestic partner health benefits in regulations, a revenue ruling, or other publication of general application. It has, however, issued at least four private letter rulings that address the subject (9034048 and 9111018 [the second ruling supplemented the first]; 9109060; and 9231062).

Based on the Internal Revenue Code and the IRS private letter rulings, in general:

- If the employee and domestic partner are considered common-law spouses under state law[7] (but remember, gay and lesbian partners are not entitled to recognition as common-law or legal spouses in any jurisdiction), the domestic partner will be treated as a spouse for tax purposes,[8] and neither the employee nor the domestic partner will be taxed on the employer-provided coverage nor on reimbursements from the plan.
- If the domestic partner resides with the employee, receives at least half of his or her support from the employee, and their relationship is not illegal under local law, the domestic partner will qualify as a "dependent" and neither the employee nor the domestic partner will be taxable on coverage or reimbursements. In any other situation, however, the employee will be taxed on the fair market value of the employer-provided coverage provided to the domestic partner (generally, the fair market value of group coverage), but reimbursements from the plan will be tax-free.
- To the extent that coverage is taxable, it also will be treated as wages subject to withholding for income tax and Federal Insurance Contributions Act (FICA) purposes; further, the employer will be required to pay Federal Unemployment Tax Act (FUTA) taxes with respect to such wages.

The following is a detailed analysis of these tax issues.

Taxability of Coverage

Under Section 106 of the Internal Revenue Code and Section 1.106-1 of the income tax regulations, the value of employer-provided health plan coverage is excludable from an employee's income when such coverage is for the employee, the employee's spouse, or the employee's dependents, as defined in the Code.

Code Section 152(a) sets forth a threshold requirement that to be a "dependent," at least half an individual's support for a calendar year must be received from the taxpayer (employee). Paragraphs (1) through (8) of Section 152(a) include within the definition of "dependent" children and various other individuals tied to an employee in traditional family relationships, but, typically, a domestic partner would not qualify under any of these paragraphs. Paragraph (9), however, includes as a dependent an individual who (1) meets the threshold support requirement, (2) for the taxable year of the employee, has as his or her principal place of abode the home of the taxpayer, and (3) is a member of the taxpayer's household. Subsection (b)(5) provides that an individual is not a "member of the taxpayer's household" if at any time during the taxable year of the taxpayer, the relationship between such individual and the taxpayer is in violation of local law.

This means that if the domestic partner of an employee qualifies as a "spouse" in a common-law marriage jurisdiction, employer-provided coverage is excludable under the Code. If the domestic partner does not so qualify, the issue is whether he or she is a "dependent" under Section 152 and, under that section, the critical issues are the support test and whether the relationship is legal under local law. Thus, for example, if the domestic partner works and is responsible for his or her own support, he or she would not qualify. Further, if state law prohibits cohabitation between unmarried partners, the domestic partner also would not qualify.

In those cases, the employee will be taxed on the value of the employer-provided coverage pursuant to Section 61 of the Code and Section 1.61-21 of the regulations, relating to taxable fringe benefits. Under Section 1.61-21(b)(1), an employee must include in gross income the amount by which the fair market value of the fringe benefit exceeds the amount, if any, paid for the benefit by the employee (in the case of health plan coverage, after-tax employee premiums) and the amount, if any, specifically excluded from income under any other Code section (which is inapplicable here). Under Section 1.61-21(b)(2), fair market value is determined on the basis of all of the facts and circumstances.

It is important to note in this connection that in the first private letter ruling on domestic partner coverage (9034048), the IRS ruled that such fair market value should be determined according to individual policy rates, even though the plan involved was a group plan. In private letter ruling 9111018, however, the IRS reversed that position and ruled that fair market value should be determined according to group rates. The IRS also has held that group rates are the applicable measure in the two other private letter rulings on domestic partner coverage.[9] However, the IRS has not elaborated in the rulings or elsewhere on how to determine the fair market value of group coverage, other than to say that such value may be substantially less or more than the fair market value of individual coverage or the subjective value of the coverage to the employee.[10]

Despite the absence of clear IRS guidance, employers that offer domestic partner coverage need to establish a reasonable method to arrive at fair market value in order to properly withhold and report. They may have to develop some type of composite rate, determined by looking at claims experience and dividing by the number of individuals in the group (and then perhaps further breaking down the rate into, for example, an adult rate and a child rate).

One issue that arises is whether, if the actual rate structure under a plan does not vary in direct correlation with the number of family members covered, fair market value can be determined along the lines of the actual rate structure. The answer is probably not, although this is not entirely clear. To take a simplistic example, assume that a plan is fully insured and there is a two-tiered premium structure under which one rate is charged for employee-only coverage and another rate is charged for employee-plus-family coverage, regardless of the number of family members insured. Assume that an employee already covers his child and now wishes to add a domestic partner. Even though such an addition would not cost the employer any more, the employer probably cannot assume that, for this reason, the employee has no taxable income on account of the coverage of the domestic partner.

Taxability of Reimbursements

Under Section 105(b) of the Code, reimbursements for medical expenses from an employer-sponsored health plan are excludable from an employee's income if the expenses relate to medical care of the employee, the employee's spouse, or the employee's dependents, as defined in Section 152 of the Code. Thus, here again, unless the domestic partner is a common-law spouse or satisfies the definition of "dependent" in Section 152(a)(9), reimbursements will not be excludable.

Section 104(a)(3) is an alternative basis for exclusion, however. That section provides an exclusion for health plan reimbursements to the extent that the employee previously was taxed on employer contributions used to provide health plan coverage. Because an employee with a domestic partner who does not qualify as a spouse or dependent already has been taxed on the value of employer-provided coverage pursuant to Code Section 61, the reimbursements are excludable.

Withholding

Private letter ruling 9109060 considers the issue of withholding on the value of employer-provided domestic partner coverage when the domestic partner was neither a spouse nor a dependent. Just as such coverage was held to be income under Section 61 of the Code, it was held to be "wages" subject to income tax and FICA withholding. (FUTA was not an issue in this ruling because the employer was a county, but it would have to be paid in the case of a private-sector employer.)

Domestic Partner's Children

Sometimes, an employee may live with a domestic partner and the domestic partner's children who are not related to the employee, by blood, legal adoption, or other traditional means. If such a child is covered in the employee's health plan, the tax analysis is comparable to that applicable to coverage of the domestic partner—that is, the results depend on whether a particular child is a "dependent" within the meaning of Section 152 of the Code. If so, the value of employer-provided coverage is excludable under Section 106 of the Code, and reimbursements are excludable under Section 105(b) of the Code. If not, the value of employer-provided coverage is taxable under Section 61 of the Code, but the reimbursements are still excludable under Section 104(a)(3) of the Code.[11]

Cafeteria Plan Coverage

Employers often provide health plan coverage through a cafeteria plan (flexible benefits plan) described in Section 125 of the Code under which an employee may choose among certain "qualified benefits," including health plan benefits and cash. If the plan is properly structured, an employee in such an arrangement can exclude the value of the benefits he or she receives from income. Sometimes, such plans provide only for "premium conversion," an arrangement that allows an employee to pay for premiums to the health plan on a pretax basis. In other instances, there is a "flexible spending account" that allows an employee to pay for medical expenses that are not covered by the basic health plan, but that qualify as medical expenses under Section 213 of the Code (for example, deductibles and copayments under the basic plan, eyeglasses not covered by the plan) from pretax dollars.

The IRS has not ruled on issues regarding cafeteria plans and domestic partners (and presumably will not rule until there are final regulations under Section 125). However, based on informal conversations with an IRS representative, it appears that, although there are several questions, there are not in fact any major problems related to coverage of a domestic partner in a cafeteria plan.

The first question is the fundamental one: May domestic partner coverage be provided in a cafeteria plan at all? This question arises from the fact that if the domestic partner is not a spouse or dependent, the health coverage provided is not a "qualified benefit."[12] However, the fact that the coverage is taxable under Section 61 of the Code makes it "cash" pursuant to Section 1.125-2, Q/A-4(b) of the proposed regulations. Thus, it is acceptable to provide domestic partner coverage in a cafeteria plan.

Second, may a flexible spending account be used to reimburse a domestic partner's medical expenses? This question arises because of the requirement under proposed regulations Section 1.125-2, Q/A-7(b)(4) that the expenses qualify for deductibility under Section 213 of the Code. Section 213 not only limits the type of deductible expenses (for example, expenses for cosmetic surgery do not qualify), but also limits the individuals on whose behalf expenses can be deducted to the employee, and the employee's spouse and dependents as defined in Section 152. Based on informal conversations with the IRS representative, however, the Section 125 regulations should be read as incorporating the Section 213 limitation on types of expenses only, and not those on qualifying individuals. Thus, a domestic partner's expenses could be reimbursed.

Third, what if an employer does not cover domestic partners under its own plan but wants to offer employees the option of buying individual policies for domestic partners through a flexible spending account? This could not be done, because proposed regulations Section 1.125-2, Q/A-7(b)(4) prohibits the use of flexible spending accounts to purchase other health coverage.

Finally, is a domestic partner a "family" member for purposes of the change in family status rules under the proposed regulations Section 1.125-2, Q/A-6(c)? In order to prevent manipulation of the tax rules, the regulations limit the situations in which changes in cafeteria plan coverage elections involving pretax benefits may be made. One situation in which changes are permissible is a change in family status; examples in the regulations include an employee's marriage or divorce and the termination or commencement of employment of a spouse. The regulations only contemplate changes involving the employee, a spouse, and dependents, however, and the term "dependent" is not defined for this purpose. Although one might infer that "dependent" should have the meaning set forth in Section 152 of the Code, informal conversations with the IRS representative indicate that the IRS might take a more liberal view and consider changes involving domestic partners to be changes that would allow an employee to modify his or her cafeteria plan election.

An alternative way of analyzing the change in family status question is that, in most cases, there should not be an actual problem. Because the domestic partner either will qualify as a spouse or dependent or, if not, his or her coverage will be provided after tax pursuant to Code Section 61, there will seldom be a potential for the manipulation problems that the change in family status rules was intended to avoid.

COBRA

COBRA requires that employers offer employees and "qualified beneficiaries" the option of continuing their health plan coverage. Failure to satisfy the rules results in an excise tax. (ERISA Sections 601 through 608 contain similar requirements.) These requirements commonly are known as "COBRA." Under COBRA, only spouses and dependent children are considered "qualified beneficiaries." Therefore, an employer may, but is not required to, extend COBRA continuation rights to domestic partners.

OTHER LEGAL ISSUES

There are several nontax-related legal issues that attach to the provision of health coverage to domestic partners. For instance, is a disabled domestic partner entitled to health plan coverage under disability rights laws? Probably not. The Americans with Disabilities Act (ADA), and various state laws, prohibit discrimination against an employee, whether disabled or not, on the basis of his or her association with a person with a disability. The ADA rule is yet to be tested but probably does not require that coverage be extended to disabled domestic partners. Under the ADA, however, once coverage is provided the employer cannot discriminate against the dependent; the theory under the ADA is that discrimination against a dependent is discrimination against the employee. Thus, it is possible (although perhaps not likely) that an ADA issue could be raised if the employer offers employees with traditional families a choice of, for example, three coverage options (e.g., a self-insured indemnity plan and two HMOs) but limits the options available for domestic partners.

Another issue involves state insurance continuation and conversion laws. Where a plan is insured such that state insurance laws are not preempted by Section 514 of ERISA, employers may be required by state law to give employees and other individuals whose group health insurance coverage otherwise would terminate the option of continuing group coverage or converting to individual coverage. These requirements, where applicable, apply in addition to, not in lieu of, federal COBRA rights. Although a survey has not been made for purposes of this article, an employer considering domestic partner coverage should check applicable state laws.

One concern occasionally raised about domestic partner coverage is that the employer may somehow be "aiding and abetting" under local laws that prohibit cohabitation among domestic partners. Obviously, applicable laws should be checked as to this point, but there do not appear to be any instances in which employers have been found liable under cohabitation statutes.

Another issue sometimes raised relates to "palimony"—that is, whether covering a domestic partner in an employee's health plan or requiring the employee and domestic partner to certify to certain facts regarding their relationship could create any unintended legal consequences for the employee and domestic partner. An employer may wish to assist its employees in researching this question under applicable state or municipal laws, but this clearly is more of a concern for employees and their domestic partners than it is for employers.

DESIGN CONSIDERATIONS

The design of health plan coverage for domestic partners obviously is highly dependent on the tax and other legal issues discussed above and on the structure of the employer's existing health plan. Thus, for example, an employer that offers employees the option of covering domestic partners who do not qualify as spouses or dependents under Section 152 of the Internal Revenue Code may wish to dispense with the administration associated with reporting and withholding on "employer-provided" coverage and instead permit employees to cover such domestic partners through the payment of after-tax premiums. An employer that provides various coverage options may wish to limit the choice of options available for domestic partners, at least if some of the options involve an insurance company or HMO that will extend coverage to domestic partners only through the imposition of a surcharge.

Other design issues involve: the criteria for establishing domestic partner status; the circumstances under which children of the domestic partner may be covered; whether COBRA-type continuation rights will be extended to domestic partners (and their children); the extent to which it may be advisable to keep coverage information (relating not just to employees with domestic partners, but to all employees) confidential; and communications about domestic partner coverage to shareholders, customers, and employees.

A final but significant design issue is whether to cover domestic partners in both heterosexual and homosexual relationships or just those in homosexual relationships. Some companies (Lotus and MCA, for example) have chosen the latter course, based on the theory that because homosexual marriage is prohibited by law, gays and lesbians are legally foreclosed from enjoying the benefits available to married couples, whereas heterosexuals are not.

THE FUTURE OF DOMESTIC PARTNER COVERAGE

On September 1, 1992, a human rights commission in Ontario ruled that Ontario law was violated when a pension plan did not provide the same benefits to same-sex domestic partners that it provided to spouses. (Health plan coverage already was provided.) This ruling was made in spite of the fact that Canadian tax law prohibits employers from retaining favorable tax treatment for their "registered" pension plans if such plans provide benefits for domestic partners and, thus, the domestic partner benefits might have to be provided through some other vehicle.

Although there might be some spillover effect from this ruling in other parts of Canada, and in the United States in the case of Canadian employers, the Ontario law will have no direct impact on U.S. law or on what U.S. employers choose to do about domestic partner coverage. Moreover, we are unlikely to see any similar, far-reaching ruling or statutory change here.[13] Among other reasons, a significant segment of the U.S. population believes that relationships between adults outside of marriage (heterosexual and homosexual) are wrong and should not be encouraged by employers through the extension of employee benefits to domestic partners.

At least within the next few years, however, it is likely that many employers will conclude that the positives of domestic partner coverage outweigh the negatives. This especially will be the case as employers are able to draw on others' experiences, as insurance companies and HMOs become more comfortable with the risks associated with domestic partner coverage, and as the tax and other legal issues are clarified.

NOTES

1. A domestic partner is defined as an adult who lives with an employee in a committed relationship but who is not married or otherwise legally related to the employee. Domestic partners can be heterosexual or homosexual.

2. Exceptions in the private sector are *The Village Voice* newspaper, which extended coverage to domestic partners in 1982, and the ACLU, which followed suit in 1983 before most governmental employers.

3. In 1992, the city council of the District of Columbia passed legislation that would have provided a special tax deduction for private-sector employers that extended coverage to domestic partners. This legislation was blocked by Congress, however. Although the issue of preemption is generally outside the scope of this article, it is important to note that state or local legislation requiring domestic partner coverage, and perhaps even legislation encouraging domestic partner coverage through tax or other incentives, would likely be subject to challenge in the case of self-insured plans under the preemption provisions of ERISA Section 514.

4. Again, however, ERISA preemption may cause applicable state and local laws used as the basis for suit to be inapplicable.

5. E. Murphy, "Understanding the Domestic Partner Dilemma: Perspectives of Employer and Insurer; The Rise of Employer-Provided Benefits for Domestic Partners," study prepared for the City of West Hollywood, California, Oct. 1992, p. 25.

6. Id. at 15-17, 33-35.

7. The District of Columbia, together with the states of Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas, treat individuals who satisfy certain criteria as common-law spouses. Ohio, which previously was a common-law jurisdiction, changed its law in 1991 but grandfathered common-law marriages that occurred in Ohio before the effective date. Ohio and other jurisdictions also give full faith and credit to common-law marriages under other states' laws.

8. Rev. Rul. 58-66, 1958-1 C.B. 60.

9. In private letter ruling 9231062, domestic partners of the employees of a city received employer-provided health plan coverage, the fair market value of which was held to be taxable under Section 61, using group rates. In addition, employees were reimbursed from a trust fund for the premiums that they paid to the plan. Such reimbursements were held to be taxable to employees under Code Section 105(a). Presumably, the taxable amount was the actual amount received.

10. Based on a general no-rulings policy with respect to fair market value determination issues, the IRS is unlikely to ever rule.

11. Private letter ruling 9109060 addresses coverage in an employer-sponsored health plan of a "privately-placed pre-adopted child" as well as that of a domestic partner, and applies the same analysis to both situations.

12. To be a "qualified benefit" under proposed regulation Section 1.125-2, Q/A-4(a)(2)(i), employer-provided coverage must be excludable under Section 106.

13. A requirement to provide benefits to domestic partners in U.S. pension plans would require changes to the Internal Revenue Code and ERISA.

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For Whom Does the Clock Tick: Public Employers' Liability for Overtime Compensation Under Federal Law

by Michael Jilka

About the Author

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INTRODUCTION

Persons employed in positions necessary to public safety, such as firefighters, law enforcement officials, and paramedics, work in a manner that is often antithetical to the ordered time frame of "normal" employment. Crime and disaster strike at unpredictable times and require prompt response. Public employers across Kansas and the rest of the nation accordingly must design compensation packages that take into account the nature of these jobs and conform to the applicable law. Otherwise, a public employer risks the potential of being subjected to costly liability, possibly jeopardizing its fiscal stability. Employees must likewise be cognizant of their rights or else run the risk of foregoing compensation to which they are entitled.

The federal wage-hour law, known as the Fair Labor Standards Act (FLSA),[1] was enacted during the Depression to ameliorate the low wages, high unemployment, and long working hours that were prevalent at that time. The principal means used to achieve the FLSA objectives were the establishment of a minimum wage and a ceiling on the number of hours that can be worked in a workweek without payment of overtime compensation. This article discusses various aspects of employee entitlement to overtime compensation under the FLSA and the consequences of a violation.

II. FLSA COVERAGE OF PUBLIC EMPLOYERS

As originally enacted in 1938, the FLSA expressly exempted states and their political subdivisions from its coverage. This exemption was removed in 1966, when Congress amended the FLSA to include within the definition of "employer" the state and its political subdivisions operating certain schools, hospitals, nursing homes, railways or carriers.[2] Congress further expanded the FLSA in 1974 to cover virtually all state and local government employees.[3]

In *National League of Cities v. Usery*, the United States Supreme Court held unconstitutional under the Tenth Amendment the FLSA's extension to state and local governments when those entities were performing traditional governmental functions.[4] In an opinion by then Justice Rehnquist, the Court held that Congress had exceeded its authority under the Commerce Clause. Nine years later, the Supreme Court overruled *Usery* and the "traditional governmental functions" test in *Garcia v. San Antonio Metro. Transit Auth.*.[5] According to the Court, the political process protected the states against excesses in congressional exercise of power under the Commerce Clause.[6] Congress responded to *Garcia* by giving state and local government employers a grace period until April 15, 1986, before the FLSA became applicable.[7]

III. OVERTIME COMPENSATION REQUIREMENTS OF THE FLSA

The FLSA requires employers to pay overtime at one and a half times the employee's "regular rate" for hours worked[8] in excess of 40 per week.[9] Certain exceptions to the 40 hour workweek[10] are recognized that are pertinent to public employers. The first exception, known as the § 207(k) exception,[11] applies to public agencies that employ persons in fire protection or law enforcement activities.[12] This exception allows public agencies to calculate an employee's hours for overtime purposes according to "work periods"[13] of between 7 and 28 days rather than on a workweek basis.[14] The maximum hours an employee subject to the § 207(k) exception can work without col-

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FOOTNOTES:

[1] 29 U.S.C. § 201 *et seq.*

[2] 29 U.S.C. § 203(d) (1966).

[3] FLSA Amendments of 1974, 29 U.S.C. § 203(d) and (x).

[4] *National League of Cities v. Usery*, 426 U.S. 833, 851-52 (1976).

[5] *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985).

[6] *Id.* at 555. There is some indication that the Supreme Court may be backing away from *Garcia* and will provide states greater protection under the Tenth Amendment against congressional action. In *New York v. United States*, 505 U.S. ___, 112 S.Ct. 2408 (1992), the Court ruled unconstitutional the take-title provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b-2021j, holding that they infringed upon the sovereignty reserved to the states by the Tenth Amendment or exceeded Congress's enumerated powers. *Id.* at 2429. *See generally* "Leading Cases," 106 Harv. L. Rev. 163, 173 (November, 1992). Thus far, however, courts have rejected the invitation to bury *Garcia* and resurrect *Usery*. *See e.g.*, *Reich v. State of New York*, 3 F.3d 581, 589-90 (2nd Cir. 1993); *Brinkman v. Dept. of Corr. of State of Kan.*, 804 F. Supp. 163, 164-65 (D. Kan. 1992), *aff'd* ___ F.3d ___, (1994 WL 117193) (10th Cir. 1994).

[7] Fair Labor Standards Amendments of 1985, Pub.L. No. 99-150, 99 Stat. 787 (1985); 29 U.S.C. § 203(d) (1988).

[8] "Work" is not defined in the statute or in the regulations. The courts have interpreted the term to mean "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Renfro v. City of Emporia, Kan.*, 948 F.2d 1529, 1536 (10th Cir. 1991), *cert. dismissed* 112 S.Ct. 1310 (1992)(quoting *Tennessee Coal Co. v. Mascoda Local*, 321 U.S. 590, 598 (1944)).

[9] 9 U.S.C. § 207(a)(1) provides:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

[10] Workweek is defined as any regularly recurring period of seven consecutive 24-hour days. 29 C.F.R. § 778.105.

[11] 29 U.S.C. § 207(k) provides:

> No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities . . . if-
>
> (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days. . .; or
>
> (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half time the regular rate at which he is employed.

[12] Persons employed in fire protection or law enforcement activities are exempt from the overtime provisions of the FLSA if their employer employs less than 5 employees in fire protection or law enforcement activities during the workweek. 29 U.S.C. § 213(b)(20).

[13] Work periods are not the same as work week or pay period.

> "Work period" refers to any established and regularly recurring period of work which, under the terms of the Act and legislative history, cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the duty cycle or pay period or with a particular day of the week or hour of the day.

29 C.F.R. § 553.224.

[14] *Cross v. Arkansas Forestry Comm'n*, 938 F.2d 912, 914 (8th Cir. 1991).

lecting overtime compensation is set forth in the regulation found at 29 C.F.R. § 553.230. For example, if a law enforcement employer establishes a work period of 28 days under the § 207(k)(1) exception, it must pay its police officers a regular wage for the first 171 hours worked and overtime wages for hours worked in excess of 171. For employees engaged in fire protection activities, the employer must pay a regular wage for the first 212 hours worked and overtime wages for hours worked in excess of 212.[15]

Overtime worked by employees subject to the § 207(k) exception is to be compensated according to the exception, and not according to hours worked in excess of 40 per week.[16] The employer has the burden of proving by "'clear and affirmative evidence'" that it has adopted a § 207(k) workweek exception.[17]

The § 207(k) exception is lost if employees spend more than 20 percent of their time in "nonexempt activities."[18] Such activities are those not performed as an incident to or in conjunction with fire protection or law enforcement activities.[19] The consequence to the employer of a miscalculation is that the normal 40 hour workweek rule is applied and the employee must be compensated for working overtime in accordance with the general rule of § 207(a).[20] Stated another way, the employer cannot average the number of hours worked over more than one workweek under § 207(a), while it has some flexibility to do so under § 207(k).

The ƒ 207(k) exception is lost if employees spend more than 20 percent of their time in "nonexempt activities."

Ambulance and rescue service employees can fall within the § 207(k) exception if their work is "substantially related to firefighting or law enforcement activities."[21] The substantial relation test has two prongs. First, the public agency must show the employees have received training in the rescue of fire, crime, and accident victims. Second, the agency must show the employees are regularly[22] dispatched to fire, crime scenes, riots, natural disasters and accidents.

The first prong is readily ascertainable,[23] but what constitutes being "regularly" dispatched is less clear. The Eleventh Circuit recently articulated a series of factors to be considered in deciding what constitutes being regularly dispatched:

> (1) the percentage of the [EMS] Service's total calls that are dispatches to fires, crimes, and automobile accidents; (2) the percentage of total EMT man-hours spent responding to dispatches to fires, crimes, and automobile accidents; and (3) the percentage of the total number of all fires, automobile accidents, and police calls that occur throughout the county to which the Service is dispatched.[24]

An employer seeking to avail itself of the § 207(k) exception for its paramedics should note that separate tables control the compensation of firefighters and law enforcement personnel.[25] Since paramedics are dispatched incident to both firefighting and law enforcement functions, their classification is of great significance. A paramedic will wish to be classified as performing a law enforcement function, while an employer will wish to classify the paramedic as a firefighter. In determining which classification is applicable, courts focus on the number of hours spent in each type of activity as opposed to the percentage of calls falling into each classification.[26]

A second exception to the requirement of overtime for hours worked in excess of 40 in a week is known as the *Belo*[27] exception.[28] Under this exception, an employer can pay an employee a guaranteed salary for up to sixty hours of work per week without incurring liability for overtime compensation, provided that the regular hourly rate does not fall below the minimum wage and the employee receives compensation at one and a half times their regular hourly rate for hours worked in excess of 40. The *Belo* exception is very useful in situations where an employee has widely fluctuating hours on a regular basis. The *Belo* exception affords the employee the security of a regular weekly income and allows the employer "to anticipate and control in advance at least some part of its labor costs.[29] In order to qualify as a *Belo* plan, an employer's pay scheme must (1) be made pursuant to a bona fide individual contract or collective bargaining agreement; (2)

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[15] When an employer qualifies for the 207(k) exemption, the regulations found in 29 C.F.R. § 553, rather than those found at 29 C.F.R. § 785, are used to determine compensable hours of work.

[16] *Martin v. Coventry Fire Dist.*, 981 F.2d 1358, 1361 (1st Cir. 1992).

[17] *Birdwell v. City of Gadsden, Ala.*, 970 F.2d 802 (11th Cir. 1992)(citing *Donovan v. United Video, Inc.*, 725 F.2d 577, 581 (10th Cir. 1984)).

[18] 29 C.F.R. § 553.212(a).

[19] *Id.*

[20] *See e.g., Burgess v. Catawba County*, 8[illegible] F. Supp. 341 (W.D.N.C. 1992).

[21] *Justice v. Metropolitan Government of Nashville*, 4 F.3d 1387, 1397 (6th Cir. 1993); *Spires v. Ben Hill County*, 980 F.2d 683, 687-88 (11th Cir. 1993)(quoting 29 C.F.R. § 553.215(a)).

[22] The term "regularly" is not defined in the regulations, although the Administrator of the Wage and Hour Division has stated in a letter ruling that the term is not intended to indicate any "specific frequency of occurrence...it must be determined on the basis of the facts in each case." *Spires*, 980 F.2d at 688.

[23] Paramedics are trained to rescue "only if they have knowledge of extrication techniques, that is, only if they have some specific training in methods of 'free[ing] a victim from imminent danger or harm by the most expeditious means.'" *Justice*, 4 F.3d at 1398 (citing *O'Neal*, 980 F.2d at 678).

[24] *O'Neal v. Barrow County Bd. of Com'rs*, 980 F.2d 674, 679 (11th Cir. 1993).

[25] 29 C.F.R. § 553.230.

[26] *Wouters v. Martin County, Fla.*, 9 F.3d 924, 930 (11th Cir. 1993).

[27] The name is derived from *Walling v. A.H. Belo Corp.*, 316 U.S. 624 (1942).

[28] 29 U.S.C. § 207(f).

[29] 29 C.F.R. § 778.404.

the duties of the employee must "necessitate irregular hours of work"; (3) the contract must specify a "regular rate of pay" for the first forty hours and "compensation at not less than one and one-half times such rate" for all hours above forty; and (4) must provide a "weekly guarantee of pay for not more than sixty hours."[30]

The phrase "irregular hours of work" contemplates significant variations in work hours both below and above forty hours per week.[31] The variations below forty must result from work requirements, not vacations, holidays, illness, or personal reasons.[32] Situations in which an employee works an irregular number of hours according to a predetermined schedule do not satisfy the requirement.[33]

If the *Belo* requirements are not met, the employee must be compensated according to the general rule of § 207(a).[34]

A. On-Call Time

One of the issues that most commonly arises under the FLSA is compensating employees for time spent on-call. Public employers must be able to call upon the services of a sufficient number of employees to respond to emergencies as they arise. In towns across Kansas, however, public employers frequently do not have the luxury of employing sufficient numbers of persons on active duty at any given time to respond to all emergencies. They must make arrangements to call upon the services of off-duty employees in the case of an overload. Depending on the nature and degree of restrictions upon the employees, the time spent on-call may be compensable.

The test for determining whether on-call time is compensable under the FLSA is whether the "'time is spent predominantly for the employer's benefit or for the employee's.'"[35] Application of the test "'requires consideration of the agreement between the parties, the nature and extent of the restrictions, the relationship between the services rendered and the on-call time and all surrounding circumstances.'"[36]

The Tenth Circuit has applied the test in a fairly strict manner against employees in recent years. In *Renfro v. City of Emporia*,[37] the plaintiffs were firefighters on call for 24 hour shifts. Although they were not required to remain at the station while on-call, they were expected to report to the station dressed in their uniforms within twenty minutes of being called. The firefighters were called back an average of three to five times a day and as many as 13 times per 24 hours.[38] The court found the frequency of the call backs infringed upon the firefighters' personal pursuits to such a degree as to render the on-call time compensable.[39]

In *Armitage v. City of Emporia*,[40] the plaintiffs were police detectives who were on-call for one week at a time every six weeks. They were not required to remain at the police station, but were required to carry pagers and be able to report to duty within twenty minutes of the page.[41] The detectives were called back on average less than twice per week. The court reversed the trial court's entry of judgment for the detectives, holding the restrictions did not prohibit the detectives from personal pursuits and that "to require compensation under these facts would require that all on-call employees be paid for standby time."[42]

...the frequency of the call backs infringed ... to such a degree as to render the on-call time compensable.

In *Gilligan v. City of Emporia*,[43] the plaintiffs were employees of city sewer and water departments who were required to be on-call for certain time periods. The city supplied the plaintiffs with pagers and required them to remain accessible, which effectively required them to remain within city limits. Plaintiff Gilligan believed he was required to use a city vehicle to respond to calls, but could not use the vehicle for personal reasons. The plaintiffs were prohibited from participating in activities that prevented them from hearing their beepers and tended to avoid paid-entrance activities that required the expenditure of money. Gilligan was required to respond to calls within one hour, while Hardesty was required to respond within thirty minutes. The court reviewed its previous on-call cases[44] and found that although plaintiffs' activities were somewhat restricted while on-call, the restrictions were not so prohibitive that plaintiffs' on-call time was spent predominantly for the employer's benefit.[45]

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[30] *Donovan v. Tierra Vista, Inc.*, 796 F.2d 1259, 1260 (10th Cir. 1986).

[31] *Id.* (quoting *Donovan v. Brown Equipment & Service Tools*, 666 F.2d 148, 154 (5th Cir. 1982)(footnote omitted)).

[32] *Id.*

[33] *Masters v. City of Huntington*, 800 F. Supp. 355, 360 (S.D.W.Va. 1992).

[34] *Condo v. Sysco Corp*, 1 F.3d 599, 603 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 1051 (1994).

[35] *Gilligan v. City of Emporia*, 986 F.2d 410, 412 (10th Cir. 1993) (quoting *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944)).

[36] *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944)).

[37] *Supra*, n. 8.

[38] *Renfro*, 948 F.2d at 1537-38.

[39] *Id.*

[40] *Armitage v. City of Emporia*, 982 F.2d 430 (10th Cir. 1992).

[41] *Id.* at 432.

[42] *Id.*

[43] *Supra*, n. 35.

[44] The court believed its decision was controlled by its previous decisions in *Armitage*, *Norton v. Worthen Van Serv., Inc.*, 839 F.2d 653 (10th Cir. 1988), and *Boehm v. Kansas City Power & Light Co.*, 868 F.2d 1182 (10th Cir. 1989).

In *Norton*, the plaintiffs were drivers for a van service that transported railroad crews to and from their trains. They worked shifts of 8 to 12 hours per day and were required to respond to calls within 15 to 20 minutes. In between calls, the plaintiffs could spend time at places such as restaurants, laundromats, pool halls, or the local gymnasium. The court held the on-call time was not compensable. *Id.* at 654.

In *Boehm*, the plaintiffs were power company linemen who could use their on-call time as they pleased, as long as they could be reached and report for work one-third of the time they were called. The court held the time was noncompensable. 868 F.2d at 1185.

[45] *Gilligan*, 986 F.2d at 413.

The overriding theme of the Tenth Circuit's on-call time case law is that public employers are afforded broad latitude to place restrictions upon employees who willingly work on-call time.[46] As long as employees are not required to respond to calls at a frequency comparable to the facts of *Renfro*, or subjected to significant geographical restrictions (i.e. remain at the fire or police station), a public employer can be fairly confident its on-call policy will pass judicial scrutiny.[47] On the other hand, a miscalculation as to the compensability of on-call periods can be expensive. To insure its policy does not subject it to overtime liability, a public employer may wish to adopt certain measures, such as providing on-call employees with pagers, lengthening the response time to the maximum feasible extent, and liberally allowing employees to trade on-call time among themselves.

The law in other circuits is consistent with the Tenth Circuit's restrictive view of compensability on this issue. An example of this view is the Fifth Circuit's decision in *Bright v. Houston Northwest Medical Center Survivor, Inc.*[48] In *Bright*, the plaintiff was a medical technician who was on-call 24 hours a day, 365 days a year, was required to respond within 20 minutes, was paged four to five times per week, and could never go on vacation or consume alcohol. The court noted the plaintiff's job was undesirable and even oppressive, but held the plaintiff was not entitled to compensation for the on-call time.[49] Other circuits espouse similar views.[50]

The law in other circuits is consistent with the Tenth Circuit's restrictive view of compensability on this issue.

B. Meal Periods.

Another frequently litigated issue for public employers under the FLSA is the compensability of in-shift meal periods. The Tenth Circuit has clarified the law regarding the compensability of these periods in a pair of recent decisions. In the process, the court stepped back from a strict "completely relieved of duty" standard[51] and held that the proper standard for determining compensability of a meal period is whether the employee is "'primarily. . . engaged in work-related duties during meal periods.'"[52]

In *Armitage*, the plaintiffs were police detectives who were required to take an unpaid 30 minute lunch break. They were permitted to eat where they wanted, including at home. They were paid for the time going to and coming from lunch. While at lunch, they were not permitted to consume alcohol and were required to respond to questions from the public if approached. If called back to duty while at lunch, they were paid at the overtime rate.[53] The court held the plaintiffs were not primarily engaged in work-related duties during meal periods.[54]

The *Armitage* court's holding rested squarely on its previous decision in *Lamon v. City of Shawnee, Kan.*[55] In *Lamon*, the plaintiffs were police officers who received a 30 minute meal period. During meal periods, they were relieved of their patrol assignments, but were required to respond to emergency calls and citizen requests and to confront crimes committed in their presence. They could eat only at locations within the city limits or in close proximity to the city and were required to either leave a telephone number where they could be reached or monitor a radio. The officers were not permitted to conduct personal business errands during this time.

The court reversed a jury verdict on the basis of an erroneous jury instruction.[56] According to the *Lamon* court, the mere fact that an officer is on-call and has some limited responsibilities during meal periods does not mandate a finding of compensability.[57] Rather, the "FLSA requires renumeration for meal periods during which a police officer is unable comfortably and adequately to pass the mealtime because the officer's time or attention is devoted primarily to official responsibilities."[58]

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[46] *See e.g., Burnison v. Memorial Hospital*, 820 F. Supp. 549, 555 (D. Kan. 1993)("The law in this circuit is clear: the mere fact that the plaintiffs may not use their time as they wish or that they may have to spend some time at home that they otherwise might spend elsewhere is not sufficient to make on-call time compensable under the FLSA.")

[47] For the public employer faced with an on-call question, a useful checklist of factors for deciding whether on-call time is compensable was provided by the court in *Owens v. Local No. 169*, 971 F.2d 347, 351 (9th Cir. 1992). Courts will consider (1) whether there was an on-premises living requirement; (2) whether there were excessive geographical restrictions on employee's movements; (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for response was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities; (6) whether use of a pager could ease restrictions; and (7) whether the employee had actually engaged in personal activities during call-in time.

[48] *Bright v. Houston Northwest Medical Center Survivor, Inc.*, 934 F.2d 671 (5th Cir. 1991) (en banc), *cert. denied*, 112 S.Ct. 882 (1992).

[49] *Id.* at 678.

[50] *See e.g., Martin v. Ohio Turnpike Comm'n*, 968 F.2d 606 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 979 (1993)(emergency service and highway maintenance workers held not entitled to compensation); *May v. Arkansas Forestry Comm'n*, 993 F.2d 632, 638-39 (8th Cir. 1993)("test is not whether an employee's leisure is completely and totally curtailed, but rather whether it is so restricted that it cannot reasonably and effectively be utilized for the employee's benefit"); *Owens v. Local No. 169, Ass'n of Western Pulp and Paper Workers*, 971 F.2d at 354 (mechanics who were on-call during night shifts and expected to respond to a "fair share" of calls or face discipline held not entitled to compensation); *Birdwell*, 970 F.2d at 810 ("employee's free time must be severely restricted for off-time to be construed as work time").

[51] *Armitage*, 982 F.2d at 431.

[52] *Id.* at 432 (quoting *Lamon v. City of Shawnee, Kan.*, 972 F.2d 1145, 1150 (10th Cir. 1992), *cert. denied* 113 S.Ct. 1414 (1993)).

[53] *Id.* at 431.

[54] *Id.* at 432.

[55] *Supra*, n. 51.

[56] The erroneous instruction read:

> Unless plaintiffs' meal periods are "bona fide" meal periods under the Fair Labor Standards Act, plaintiffs' meal periods are compensable work time. Bona fide meal periods are not work-time. To qualify as a bona fide meal period, the employee must be completely relieved from duty for the purposes of eating regular meals. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating.

Lamon, 972 F.2d at 1158.

[57] *Id.* at 1157.

The employer in *Lamon* had adopted the § 207(k) exception, and therefore the regulation found at 29 C.F.R. § 553.223,[59] rather than the general meal period regulation of 29 C.F.R. § 785.19, was applicable.[60] The erroneous jury instruction in *Lamon* paralleled the language from § 785.19. The court found two important differences between the two regulations. First, the former regulation omitted the following sentence from § 785.19: "The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating." Second, the former regulation gave examples of situations where meal periods were compensable. According to the court, the jury instruction erroneously approved the view that the performance of *any* official duty during meal periods rendered the time compensable.[61]

In footnote 18 of its opinion, however, the court noted that while its interpretation of the "completely relieved from duty" standard was specifically restricted to § 553.223(b), its contrasting of the two regulations did not necessarily mean the standard had a different meaning in each of the regulations. This latter statement appears to contravene the court's earlier analysis distinguishing the two regulations. The Seventh Circuit, along with two courts in this district, has observed in dicta that the differences in the standards governing the compensability of meal periods arising under the two regulations are not material.[62] All of these courts drew this conclusion from footnote 18 of *Lamon*. This analysis appears to be sound.

Lamon reconciles the "completely relieved of duty" regulatory standard with traditional principles underlying the FLSA. *Lamon* and *Armitage* indicate the regulatory term "completely" does not have a literal meaning, but is read in conjunction with the "predominant benefit" test developed by the courts.[63] In other words, employees are completely relieved of duty during meal periods when their time is not spent predominantly for the benefit of the employer.[64]

C. Sleep Periods.

In situations in which an employee is required to be on duty for 24 hours or more, the employer and employee can agree to exclude eight hours of sleep time "'provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep.'"[65] The employer bears the burden of establishing the existence of an implied or express agreement. In the absence of an agreement, the sleep time constitutes hours worked.[66]

The adequacy of the sleeping facilities raises a distinctly factual question not easily amenable to summary judgment. Some of the factors relevant to the determination include the size of the sleeping quarters, the number of persons inhabiting the sleeping quarters, whether proper ventilation exists, gender privacy, easy access to private showers and restrooms, and the existence and frequency of noise disturbances. As for what constitutes an uninterrupted night's sleep, the Department of Labor's regulations state that if an employee cannot get at least five hours of sleep during the scheduled sleep period, the entire eight hours is considered working time.[67] The five hour mark thus serves as a benchmark for determining whether this requirement is satisfied.

D. Compensatory Time.

Public employers can, under certain conditions, provide employees with compensatory time off in lieu of overtime pay.[68] If the public employer elects to give compensatory time in lieu of overtime pay, it must do so at a rate of not less than one and one-half hours for each hour of overtime. *Id.*

The conditions under which the public employer can provide extra time off were recently clarified by the United States Supreme Court.[69] In *Moreau v. Klevenbagen*, the plaintiffs were a group of deputy sheriffs in Texas who sought, unsuccessfully, to negotiate a collective FLSA compensatory time agreement by way of their designated representative. Although the plaintiffs were represented by a union for matters such as processing grievances and handling workers' compensation claims, the union was prohibited by Texas law from entering into a collective-bargaining agreement with the County. Plaintiffs filed suit, alleging that the County violated the FLSA by paying for overtime work with compensatory time, rather than overtime pay, absent an agreement with their representative.

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[58] *Id.* at 1155-56.

[59] Section 553.223(b) provides that for agencies using the § 207(k) exception, meal time may be excluded from hours worked on tours of duty of less than 24 hours

> provided that the employee is completely relieved from duty during the meal period, and all the other tests in § 785.19 of this title are met. On the other hand, where law enforcement personnel are required to remain on call in barracks or similar quarters, or are engaged in extended surveillance activities (e.g., "stakeouts"), they are not considered to be completely relieved from duty, and any such meal periods would be compensable.

[60] Administrative interpretations of the FLSA, while not binding, nevertheless serve as a useful standard to guide courts in ascertaining the compensability of activities under the FLSA. *Skidmore v. Swift*, 323 U.S. at 140.

[61] *Lamon*, 972 F.2d at 1158.

[62] *Alexander v. City of Chicago*, 994 F.2d 333, 336-37 (7th Cir. 1993); *Burnison*, 820 F. Supp. at 557; *Brinkman*, 804 F. Supp. at 171.

[63] *Henson v. Pulaski*, 6 F.3d 531, 534 (8th Cir. 1993); *See Alexander*, 994 F.2d at 337; *Lee v. Coahoma County, Miss.*, 937 F.2d 220, 225 (5th Cir. 1991).

[64] *Cf. Koblbeim v. Glynn County, Ga.*, 915 F.2d 1473, 1477 (11th Cir. 1990) (firefighters required to remain at the station and subject to emergency calls during mealtime periods entitled to compensation).

[65] *Hultgren v. County of Lancaster, Neb.*, 913 F.2d 498, 501 (8th Cir. 1990) (quoting 29 C.F.R. § 785.22(a)).

[66] *Id.*

[67] 29 C.F.R. § 785.22(b).

[68] 29 U.S.C. § 207(o) provides in part:

> (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.
>
> (2) A public agency may provide compensatory time under paragraph (1) only-
>
> (A) pursuant to-
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and
>
> (B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

[69] *Moreau v. Klevenbagen*, 508 U.S. ___, 113 S.Ct. 1905 (1993).

The issue before the Court was whether a public employer in a state that prohibits public sector bargaining could negotiate individual compensatory time agreements with its employees when the employees have designated a union representative. The Court held the plaintiffs did not have a representative authorized by law to enter into an agreement providing for use of compensatory time, and therefore the employer was authorized to negotiate individual agreements concerning compensatory time.[70]

...Kansas law allows employees to bargain collectively.

Unlike Texas, Kansas law[71] allows employees to bargain collectively.[72] Thus, if employees of a public agency in Kansas are unionized, the public employer can only provide compensatory time off through an agreement with the union representative.[73]

E. Travel Time and Preliminary/Postliminary Activities.

In response to the Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*,[74] Congress amended the FLSA[75] to exclude from coverage time spent "traveling to and from the actual place of performance of the principal activity" as well as activities which are preliminary and postliminary to the principal activity.[76] Despite this general prohibition, employees can obtain compensation for travel time if they can show the travel constitutes a "principal activity." The term "principal activity" includes all activities that are "integral and indispensable" to the principal activity.[77] The test for principal activities and integral and indispensable parts of such activities is "whether [the activities] are performed as part of the regular work of the employees in the ordinary course of business."[78]

Litigation over the compensability of travel time often involves situations in which an employee is required to transport items such as equipment or tools.[79] In these situations, courts focus upon how the transport of such items relates to the normal functioning of the employer's business.[80] The Tenth Circuit's cases illustrate that the inquiry is a flexible one and not susceptible to precise delineation.[81]

The same analytical framework governs the compensability of preliminary and postliminary activities.[82] The hurdle a plaintiff must clear in these cases is to show the activities in question are so essential to the performance of the job as to render them "principal activities." For example, in *Nichols v. City of Chicago*,[83] the court held that time spent for the home care of police canines was an integral and indispensable part of the officers' principal activities and therefore compensable.[84] The court found it significant that the City compensated the plaintiffs for dog-care activities performed while on-duty, and these duties were identical regardless of when or where performed.[85]

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[70] 113 S.Ct. at 1912.

[71] K.S.A. 44-803.

[72] According to the Department of Labor's regulations

> "[T]he question of whether employees have a representative for purposes of FLSA section [207(o)] shall be determined in accordance with State or local law and practices."
> 52 Fed. Reg. 2014-2015 (1987).

[73] *See Moreau*, 113 S.Ct. at 1912 (FLSA "favors subclause (i) agreements over individual agreements by limiting use of the latter to cases in which the former are unavailable.")

[74] *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

[75] Portal-to-Portal Act, 61 Stat. 86 (1947).

[76] 29 U.S.C. § 254(a) provides in pertinent part:

[N]o employer shall be subject to any liability or punishment under the FLSA...on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee...

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activities, which occur either prior to the time of any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

[77] *See Steiner v. Mitchell*, 350 U.S. 247, 255-56 (1956). *See* 29 C.F.R. § 790.8.

[78] *Truslow v. Spotsylvania County Sheriff*, 783 F. Supp. 274, 277 (E.D.Va. 1992), *aff'd* 993 F.2d 1439 (quoting *Dunlop v. City Elec., Inc.*, 527 F.2d 394, 401 (5th Cir. 1976)).

[79] The Department of Labor's regulation found at 29 C.F.R. § 790.7(d) offers some guidance on this issue. It provides in part:

> An employee who walks, rides or otherwise travels while performing active duties is not engaged in the activities described in section 4(a). An illustration of such travel would be the carrying by a logger of a portable power saw or other heavy equipment (as distinguished from ordinary hand tools) on his trip into the woods to a cutting area. In such a situation, the walking, riding, or traveling is not segregable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) and it does not constitute travel "to and from the actual place of performance" of the principal activities he is employed to perform.

[80] *See e.g., Graham v. City of Chicago*, 828 F. Supp. 576, 582 (N.D.Ill. 1993)(time spent transporting police canines held to be an integral and indispensable part of officers' principal activities that are required by their employer and which inures to the employer's benefit).

[81] *Crenshaw v. Quarles Drilling Corp.*, 798 F.2d 1345 (10th Cir. 1986); *D A & S Oil Well Servicing, Inc.*, 262 F.2d 552, 555 (10th Cir. 1958).

[82] *See e.g., Steiner v. Mitchell*, 350 U.S. at 255 (changing clothes and showering at a battery production plant where employees were exposed to dangerous chemicals held compensable); *Mitchel v. King Packing Co.*, 350 U.S. 260 (1956)(time spent sharpening knives at meat packing plant held compensable).

The Tenth Circuit has certified for interlocutory appeal the case of *Reich v. IBP, Inc.*, 820 F. Supp. 1315 (D. Kan. 1993), which involves the compensability of several preliminary and postliminary activities.

[83] *Nichols v. City of Chicago*, 789 F. Supp. 1438 (N.D. Ill. 1992).

[84] *Id.* at 1445.

F. Good Faith Defense.

Section 259(a)[86] provides employers with a complete defense to liability if they can prove their conduct was in good faith and in reliance upon a written opinion from the Wage and Hour Division of the Department of Labor. The purpose of the § 259(a) defense is to protect employers who innocently follow the law as it was laid down to them by government agencies, without notice that such interpretations are erroneous.[87] An employer who seeks to invoke § 259(a) must prove: (1) its compensation policies were adopted in reliance on a written interpretation of the FLSA by the Administrator of the Wage and Hour Division of the Department of Labor; (2) its policies were in conformity with that interpretation; and (3) it acted in good faith.[88]

The § 259(a) good faith defense has a fairly narrow application. An employer seeking to rely upon the good faith defense must be prepared to show that the administrative interpretation relied upon provides a clear answer to its particular situation. The emphasis is upon specificity. It is not sufficient for the employer to simply allege it read the pertinent regulations and acted in what it thought was conformity to those regulations. Such an approach would allow employers to circumvent the FLSA by shifting the focus from the employer's objective conduct to its subjective intentions.

If doubts arise, the public employer should seek written guidance from the Wage and Hour Administrator prior to implementing its compensation plan.[89] The employer's request should be as factually specific as possible, state that the employer wishes to rely on the § 259(a) defense, and state that the matter is not in litigation.

IV. DAMAGES

Violations of the FLSA can subject a public employer to significant penalties. Plaintiffs who establish a violation of the minimum wage or overtime compensation provisions can recover their back wages, plus an additional equal amount as liquidated damages.[90] The court is also required to award the plaintiff costs and a reasonable attorney's fee.[91] An employer's liability generally extends to back pay for the two years preceding the filing of the lawsuit. If the violation is willful, the period is three years.[92] Violations are usually deemed continuing in the sense that a new cause of action accrues with each new paycheck.[93]

Prior to 1988, an employer's actions could be deemed willful if the employer "knew or suspected that its actions might violate the FLSA."[94] Good faith was not a defense under this standard. In *McLaughlin v. Richland Shoe Co.*,[95] the Supreme Court rejected this standard, finding the term "willful" was synonymous with "voluntary," "deliberate," and "intentional." The Court held a violation can be deemed "willful" when the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute."[96] The plaintiff bears the burden of proving the employer's conduct was willful.[97]

Plaintiffs ... can recover their back wages, plus an additional equal amount as liquidated damages.

Section 216 mandates an award of liquidated damages when a violation of the FLSA is established. The liquidated damages are intended to compensate employees for losses they may suffer by failing to receive their wages at the time they were due.[98] However, Congress subsequently enacted legislation that gives the court discretion not to award liquidated damages if the employer can show "to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not in violation of the [FLSA]."[99] The purpose of this good faith defense is to "mitigate the harshness of the then-strict liability offense of violating Section 216, with its attendant double-damage assessment."[100] The employer bears the "substantial burden" of proving that its failure to comply with the FLSA was in good faith and predicated upon reasonable grounds.[101]

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[85] *Id.* at 1442.

[86] 29 U.S.C. § 259(a) provides, in relevant part:

> No employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended. . . if he pleads or proves that the act or omission complained of was in good faith and in reliance on any written administrative regulation, order, ruling, approval, or interpretation of the agency of the United States specified in subsection (b) of this section [Administrator of the Wage and Hour Division]. . . Such a defense if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

[87] *Cole v. Farm Fresh Poultry, Inc.*, 824 F.2d 923, 929 (11th Cir. 1987).

[88] *Burnison*, 820 F. Supp. at 557 (citing *Hultgren v. County of Lancaster, Neb.*, 913 F.2d at 507).

[89] To request a written opinion for purposes of § 259(a), the employer should write to: Ron Dean, Deputy Administrator, United States Department of Labor, Wage & Hour Division, 911 Walnut Street, Room 2000, Kansas City, Missouri 64106.

[90] 29 U.S.C. § 216(b).

[91] *Id.*

[92] 29 U.S.C. § 255(a).

[93] *See e.g., Aaron v. City of Wichita, Kan.*, 797 F. Supp. 898, 902 (D. Kan. 1992).

An exception to this rule exists when a plaintiff's claim alleges a single violation instead of a continuing violation. For example, in *Alldread v. City of Grenada*, 988 F.2d 1425 (5th Cir. 1993), a group of firefighters sought compensation for sleep time. The applicable regulation (§ 553.223(c)) required an agreement between the employer and the employees in order for sleep time to be noncompensable. The firefighters contended they were coerced into signing an agreement. Since the sole basis for the firefighters' claim was that the City coerced them to relinquish their FLSA rights under threat of termination, the court found the alleged act of coercion to be a single violation of the FLSA. *Id.* at 1432. *Cf. Beale v. District of Columbia*, 789 F. Supp. 1172, 1176 (D.D.C. 1992)(police officers seeking overtime pay cannot avoid two year statute of limitations by framing their claim as one for deprivation of unused compensatory time).

[94] *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972).

[95] *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988).

[96] *Id.* at 133.

[97] *Burgess*, 805 F. Supp. at 350.

[98] *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982).

The objective test can be satisfied when the employer purposefully "engaged in the acts proven to be violations but did so under a mistaken belief, although reasonable, that its acts were in conformity with the law."[102] It is important to note that the employer has a duty to keep abreast of changes in the law. An employer who merely relies upon its own interpretation of administrative regulations promulgated by the Wage and Hour Division or other governmental agencies will not be able to invoke the § 260 defense unless the factual situation described in the regulations closely parallels the employer's own situation.[103] Moreover, an employer who has knowledge of circumstances that should place it on notice of FLSA violations is not acting in good faith.[104]

V. CONCLUSION

The past few years have witnessed a significant increase in the number of FLSA cases seeking payment of overtime compensation. In the process, the courts have clarified several aspects of the FLSA, most notably the on-call and meal period provisions. The trend of these decisions appears to give public employers greater latitude to place restrictions upon employees without being required to pay compensation. The consequences of a miscalculation by a public employer are significant, however, and counsel in favor of a regular review of compensation plans. ■

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[99] 29 U.S.C. § 260. The statute applies only to liquidated damages and not to attorney's fees. *Luther v. Z. Wilson, Inc.*, 528 F. Supp. 1166, 1176 (S.D.Ohio 1981).

[100] *York v. City of Wichita Falls, Tex.*, 763 F. Supp. 876, 880 (N.D.Tex. 1990) (citing *LeCompte v. Chrysler Credit Corp.*, 780 F.2d 1260, 1263 (5th Cir. 1986)).

[101] *Kinney v. District of Columbia*, 994 F.2d 6, 12 (D.C. Cir. 1993) (Citation omitted); *Sinclair v. Automobile Club of Oklahoma, Inc.*, 733 F.2d 726, 730 (10th Cir. 1984); *See* 29 C.F.R. § 790.22(b).

[102] *York*, 763 F. Supp. at 881 (Citations omitted).

[103] *See Doty v. Elias*, 733 F.2d 720, 726 (10th Cir. 1984).

[104] *Horan v. King County, Wash.*, 740 F. Supp. 1471, 1482 (W.D.Wash. 1990).

II. ACCOMMODATION ISSUES

THE AMERICANS WITH DISABILITIES ACT
June 26-29, 1994
Anne Taylor, Esq.
Harvard University
Cambridge, Massachusetts

A VIEW FROM THE TRENCHES: CURRENT ISSUES IN ADA TITLE I COMPLIANCE FROM THE PERSPECTIVE OF UNIVERSITY COUNSEL

I. **Title I Institutional Risk Management.**

A. Rapidly increasing number of ADA charges. Since Title I became effective in July 1992, over 16,000 individual ADA charges have been filed. EEOC reports that ADA charges are settled before litigation at twice the rate of other charges of discrimination. In almost all cases, EEOC is insisting on some monetary payment as part of the conciliation package. Both EEOC and DOJ have recently brought suits to enforce the ADA. This is only going to get worse.

B. Institutional cost of Title I compliance is significant and growing. Principle cost item has not been paying for employee accommodations, but funding legal and Human Resource time addressing ADA issues. Harvard has had few Section 504 and no ADA charges filed to date. However, considerable Office of General Counsel time is spent consulting with supervisors and Human Resource professionals in trying to figure out what our ADA obligations are in particular cases. Human Resource folks prudently feel unable to advise or problem solve without significant legal input and supervision.

C. Our problems tend to arise with current employees, not applicants, and principally involve performance management, discipline and discharge and, more broadly, what is a "reasonable" accommodation. This is consistent with EEOC data showing that 49% of charges filed allege discriminatory discharge, followed by 23% alleging failure to make a reasonable accommodation, 13% alleging failure to hire, and 10% alleging harassment.

D. Most frequent and toughest issues arise with hidden disabilities particularly mental and emotional problems, substance abuse, learning disabilities, or chronic or progressive illness or impairment.

E. A number of factors make these claims likely to increase.

  a. An aging workforce.

  b. An increasingly diverse workforce including more individuals with disabilities.

  c. An increased awareness and use/abuse of available legal protections.

  d. An increasingly stressful workplace: increased demand for productivity, increased performance management, lack of job security, rapid technological and organizational change, and a decline in the availability and quality of external support systems.

F. We struggle on a case by case basis, and with the expenditure of enormous professional time, to determine what a fact-finder would deem to be reasonable accommodation or undue hardship in the context of a highly decentralized, flexible environment perceived to have vast available resources. Most common and knotty problems arise not with space modification, adaptive equipment, auxiliary aids, or requests for like accommodations, but with requests for leave, job modification, relief from performance expectations, or suspension of progressive discipline on the basis of a hidden disability.

G. Another significant demand on lawyer time is rationalizing and interpreting the interface between the ADA and other state and federal statutes including the Family Medical Leave Act (FMLA), workers' compensation laws, and the NLRA.

II. How the Lawyers Earn Their Daily Bread: Particularly Bedeviling ADA Issues

A. Performance Management, Discipline and Discharge.

We are increasingly faced with claims by underperforming employees that their deficiencies are the result of previously unreported hidden disabilities or that the process of performance management, progressive discipline, or imminent discharge has created a disability for which accommodation is required. The most common claims are of underlying, (and previously unreported and unknown) mental and emotional disabilities (including stress), substance abuse, and learning disabilities. Employees facing negative performance management events, such as poor performance evaluation, suspension or termination, often claim that they have suffered emotional distress compensable under workers' compensation statutes, under the employer's disability plan, or claim a reasonable accommodation because they have a covered disability under the ADA. Many stop coming to work claiming stress or emotional illness incident to the disciplinary process, and request FMLA leave or leave as an ADA reasonable accommodation.

a. *Mental and Emotional Disabilities*

1. Perhaps universities attract and retain a higher percentage of employees likely to suffer or claim mental or emotion disabilities. EEOC data through July 1993 shows 9.8% of ADA charges are based on mental or emotional illness. Intuitively, the percentage incidence of such claims we face is substantially higher. Most claimed disabilities were unknown or disregarded at the time of hire and arise later with discipline or discharge of incumbent employees.

2. This is a particularly difficult area:

    (1) because of stigma attached to the reporting and understanding of mental or emotional illness;

    (2) because of the suspicion of and real possibility for abuse;

    (3) because there is no objective marker and employees may move (or claim to move) in and out of protected status;

    (4) because the requested accommodation (e.g., leave, flexible schedule, new supervisor, suspension or modification of performance standards, reduction in workplace stress) are understandably viewed by supervisors as inconsistent with strong performance and as unreasonable or unachievable in the context of an inherently demanding workplace;

    (5) because supervisors are ill equipped to understand or objectively evaluate the claimed disability. In an essentially "do good"

environment, supervisors are drawn into the role of enabler or caregiver, until the situation has reached a crisis and an employment action is required, the predicates for which are often insufficiently documented.

3. Available legal and regulatory guidance:

(1) ADA defines disability to include both physical and mental disabilities.

(2) Employers are prohibited from discriminating on the basis of or are required to accommodate only known disabilities. Mental or emotional disabilities are commonly hidden. The applicable standard is likely to be whether, at the time of the challenged employment action, the employer knew or should have known of the existence of a mentally or emotionally disabling condition. See, e.g., *Landefeld v. Marion General Hospital, 994 F.2d 1178, 1181,* (6th Cir. 1993*); Phelps v. Field Real Estate Co.*, 793 F. Supp. 1535 (D. Colo. 1991); *American University v. District of Columbia Comm. on Human Rights*, 598 A.2d 423 (D.C. 1991); *Schulte v. Dept. of Air Force*, 50 MSPR 126 (MSPB 1991).

(3) For ADA protection, the claimed disability must be a mental impairment that substantially limits a major life activity, a record of such an impairment, a perception that such an impairment exists, or an association with an individual with such an impairment. Not every work anxiety or conflict is protected, no matter how real or how disabling. Note that the condition may qualify as a serious health condition under the Family Medical Leave Act (FMLA).

(4) For ADA protection, the claimed mental or emotional condition must be a recognized mental disorder. Check the DSM-III. Lousy personality, poor interpersonal skills, peculiar sensitivity to criticism, intolerance of performance

management or workplace stress may or may not be a protected mental disability. 29 CFR §1630.2(n). See, e.g., *Daley v. Koch*, 892 F.2d (2d Cir. 1989).

(5) For ADA protection, the claimed mental or emotional disability must prevent the employee from working in a class or broad category of jobs. Therefore, if the individual claims to be prevented by virtue of a disability from obtaining or holding a particular job (e.g. student affairs officer, lab technician or night security guard) or working with a particular supervisor, or working in a particular setting or particular hours, he/she may not be disabled within the meaning of the Act. See, e.g., *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986); *Mackie v. Runyon*, 894 F. Supp. 1508 (M.D.Fla. 1992);

(6) The employer is obliged to determine whether it is possible for the employee to perform the essential functions of the job with a reasonable accommodation. Commonly requested accommodations for mental and emotional disabilities include eliminating stress from the work environment, changing supervisors or work assignments, leave, flexible work schedule, counselling of supervisors and co-workers to enable them to better deal with the disabled employee, communication modifications including written work instructions or more customary supervisory input. No clear guidance; its a case-by-case analysis and no safe harbor for employers. 29 CFR §1630.2(o)(ii). See, e.g., *Arensen v. Heckler*, 879 F.2d 393 (8th Cir. 1989); *Kent v. Derwinski*, 790 F. Supp. 1039 (E.D.Wash. 1991). Note that the ADA provides that reasonable accommodation may include reassigning the employee (not applicant) to a vacant equivalent (or, if not available, a lower graded) position that he/she can perform. 41 USC §12111(9)(b). See, e.g. *Mackie v. Runyon*, 894 F. Supp. 1508 (M.D. Fla. 1992); *Wimbley v. Bolger*, 642 F. Supp. 481

(W.D.Tenn. 1986), aff'd, 831 F.2d 298 (6th Cir. 1987).

(7) The employer may argue that normal job requirements such as taking ordinary supervisory direction, working a normal work day, and tolerating ordinary job stress are essential functions of the job; inability to meet them renders the employee not qualified, or that modification of the job to accommodate such limitations is not reasonable or is an undue hardship. Sometimes this works and sometimes it doesn't. See, e.g., *Guice-Mills v. Derwinski*, 967 F.2d 794 (2d Cir. 1992); *Pesterfield v. Tennessee Valley Auth., 941 F.2d 437 (6th Cir. 1991); Chiari v. City of League City, 920 F.2d 311 (5th Cir. 1991); Shea v. Tisch, 870 F.2d 786 (1st Cir. 1989); Mancini v. General Electric Co.*, 820 F. Supp. 141 (D.Vt. 1993); *Adams v. Aldersen*, 723 F. Supp. 1531 (D.D.C. 1989); *Schmidt v. Bell*, 33 FEP 839 (E.D.Pa 1983); *Day v. Department of Army*, 47 MSPR 617 (MSPB 1991).

(8) In the university setting, undue hardship incident to accommodation of a mental or emotional disability is difficult to establish. We have generally flexible employment policies and practices providing, in many instances, for modified work hours, flex-time and job sharing, There is often inconsistent enforcement of existing attendance and tardiness rules. Leave policies may be applied flexibly. We tolerate a great deal of eccentricity. Factors legally permitted to be considered in determining whether an accommodation would constitute an undue hardship include: (a) the nature and cost of the accommodation taking into account the availability of tax credits or outside funding; (b) the overall financial resources of the facility or facilities involved, the number of persons employed by the facility, and the effect on expenses and resources; (c) the overall financial resources of the covered entity and the overall size of the business in

terms of numbers of employees and the number and type of facilities; (d) the type of operations, including the composition, structure and function of the workforce and the geographic, administrative and fiscal relationship between the facilities of the covered entity; and (e) the impact of the accommodation on the facility, including the impact on other employees and on the ability of the facility to conduct business. 29 CFR §1630.2(p). Where a university is large, perceived to be well financed, decentralized, flexible, generally sensitive to individual situations, and progressive in its personnel policies, undue hardship may be virtually impossible to establish in a particular case.

4. To reduce (not eliminate) lawyer time, you should encourage the training of human resource staff in the management of emotional and mental disabilities in the workplace. Some advice:

    (1) Don't inquire about the possible existence of a mental or emotional disability unless objective events would give them good cause to know that such a disability exists, then couch the inquiry in terms of specific behaviors, i.e., "I have observed that you ... on the job. Here are two recent examples. Is there a reason for this behavior that you would like to share with me?"

    (2) If no disability is identified and problem behavior continues, the HR staff or supervisor should proceed with the ordinary disciplinary process, identifying inappropriate workplace behaviors and describing acceptable practices or conduct.

    (3) If the staff member cites a mental or emotional disability as the reason for the performance deficit, the supervisor may ask for medical verification including a description of potential accommodations.

(4) Ask for consent to communicate with the care provider. If granted, describe the essential functions of the job and ask for information, in writing, about the employee's ability to perform those functions with reasonable accommodation. Ask for specifics about any identified accommodations.

(5) If the employee cannot be reasonably accommodated and/or continues to exhibit inappropriate workplace behavior even with a reasonable accommodation, the employer has the right to require acceptable performance as a condition of continued employment.

(6) If the employee goes out on leave or short-term disability, reentry to the work environment is a critical time. See if the appropriate HR person or supervisor can form an alliance with the caregiver and seek advice. Try to minimize stress and monitor progress closely. Co-workers may have to be counselled.

(7) When all is said and done, the employer has the right to require acceptable performance and behavior.

b. Substance Abuse

1. In an increasing number of cases, it is either apparent or claimed that performance or attendance deficiencies are related to the abuse of drugs or alcohol. This is a particularly difficult area for supervisors, Human Resource professionals and lawyers:

(1) because the employee will typically deny substance abuse as a cause of performance deficiencies;

(2) because supervisors are uncertain if and how to raise issues of substance abuse and commonly engage in enabling behavior until the problem is at a crisis point;

(3) because a claim of previously unsuspected substance abuse, and a demand for accommodation, (including leave and/or rehabilitation instead of termination) can arise late and disrupt an ongoing disciplinary process;

(4) because of the absence of clear legal guidance on recurrent questions as the propriety of the inquiries regarding past drug or alcohol use or addiction; the use of last chance agreements, compulsory rehab, EAP programs and leave as reasonable accommodations; and applicability of the "direct threat" defense.

2. A major difference between the ADA and the Rehabilitation Act is that the ADA makes clear that an employer is entitled to require that an employee who uses illegal drugs or is an alcoholic conform to the same standards for job qualification and performance as other employees, even if the unacceptable workplace behavior or poor performance is related to the drug use or alcoholism. Under the Rehabilitation Act, if an employee who engaged in conduct warranting termination could claim that s/he could not be disciplined or terminated because the conduct was the result of a covered disability, the employer would be required to offer a reasonable accommodation, typically leave, compulsory rehabilitation and/or a last change agreement, in lieu of termination. Under the new ADA language explicitly permitting application of uniform work standards, employers can argue that such accommodations are not required if the conduct would have otherwise warranted discipline or termination.

3. The ADA strictly regulates pre-employment inquiries about disabilities. You could probably ask "Are you currently using illegal drugs or do you drink", but there is a risk that such a question would be interpreted as requiring the disclosure of drug addiction or alcoholism. If such an inquiry is important, for example in University police, student counselling, or financial jobs, it should wait until a conditional offer of employment has been made.

4. Drug Addiction

(1) Former drug addicts, addicts in supervised rehabilitation programs, individuals with a history of drug addiction, and individuals erroneously regarded as being past or present drug addicts are protected from discrimination and are entitled to reasonable accommodation.

(2) Current users of illegal drugs are not within the definition of a "qualified individual with a disability" and are not protected. Employers may permissibly discharge or take other action on the basis of the current use of drugs. Not clear what current use means. How long in the past would the last use be to qualify as current use? What about former addicts or addicts in rehabilitation programs who have a minor relapse? Have they lost ADA protection? Must they be reasonably accommodated with leave, further opportunity for rehabilitation, or a last chance agreement or can they be fired on the basis of the drug use. Discharge is probably O.K.

(3) Casual drug users are not protected. How can the employer tell whether the drug use is addiction, thus a covered disability, or merely casual use that is not protected? Runs up against restrictions of pre and post employment inquiries.

(4) Drug testing is permissible under the ADA.

(5) An employee may be disciplined or discharged for illegal drug use, at work or outside, even if the drug use does not adversely affect performance.

5. Alcoholism

(1) Current alcoholics (even if they are still drinking), recovering alcoholics, relapsed alcoholics, individuals with a history of alcoholism, and individuals wrongly regarded as

alcoholic are protected. See e.g., *Mackey v. Cleveland State University*, 837 F. Supp. 1396 (N.D. Ohio 1993).

(2) Reasonable accommodation is required, but, under the ADA, it may be limited by the proviso that all employees can be required to conform to the same work standards. See above.

(3) Attached is material describing training developed by Harvard's EAP program to train supervisors and HR professionals in addressing substance abuse problems in the workplace.

c. *Learning Disabilities*

1. This is an increasingly common issue as more learning disabled individuals who have received diagnostic and adaptive services in high school and college enter the skilled workforce. Subsequent technological change, computerization, and increased pace of worklife may result in inability to adapt or perform well because of a learning disability.

2. Much of the thinking and legal authority relating to accommodation of learning disabilities developed around students, not employees; many of the same principles will apply. Interesting cases include, *Wynne v. Tufts University*, 976 F.2d 791 (1st Cir. 1992). *U.S. v. University of Alabama*, 908 F.2d 740 (11th Cir. 1990); *Halasz v. University of New England*, 816 F. Supp. 37 (D. Maine 1993). There are a few cases dealing with learning disabled employees. E.g., *Pandazides v. Va. Bd. of Ed*, 57 FEP 232 (4th Cir. 1991).

3. Neuropsychological testing may be required by the employer to determine the existence of a learning disability and to identify any potential reasonable accommodations.

4. Reasonable accommodation of an established learning disability is required. Typically requested accommodations include testing, counselling and retraining; different techniques of supervision

(e.g. written instead of verbal instructions); distraction free environments (recent cases indicate that working at home may be a reasonable accommodation); job restructuring or reassignment, and auxiliary aids.

B. Direct Threats

a. The ADA permits employers to not hire or to discharge employees who pose a direct threat to the health or safety of the employee or others in the workplace. This is of particular relevance in light of recent episodes, workplace violence and the possibility of employer liability for negligent hire or retention of potentially violent or dangerous employees. This defense is particularly relevant in dealing with mentally or emotionally impaired employees or employees with serious substance abuse problems.

b. As an exception to the non-discrimination provisions of the ADA, this exception will be narrowly construed. To use the direct threat exception to the ADA, the employer must show:

1. the specific risk of harm and the specific behavior or condition that results in the risk. This must be based on specific factual evidence, not speculation or stereotypes.
2. there must be a demonstrable, not speculative, present risk of harm based on the employee's current ability to perform the job with or without a reasonable accommodation. This must be assessed on an individual basis.
3. there must be a high probability that the harm will occur if the employee is hired or remains in the workforce.
4. the potential harm must be substantial. This will depend on the nature of the disability, the type of job, and the medical history of the individual employee.

5. A determination of direct threat must be based on current medical knowledge or the best available objective evidence. This is often hard to get. It is very difficult to get psychiatrists or other mental health professionals to commit to a prediction about future risk of substance abuse relapse, suicide, or violence. Balanced against the difficulty of getting reasonable assurance about the safety of an employee in the workplace is the real possibility of liability for negligence hire or retention if the disability results in harm to the employee or others. Two recent Harvard cases in point: (1) a despondent HIV positive employee who made repeated threats (i.e., "I feel like a postal worker who comes in to work and blow people away" and threatened to "run over" a senior university official. The psychiatrist would provide no prediction of violence. The employee was discharged. No complaint yet filed. (2) a suicidal laboratory worker who stole and ingested hazardous material. The psychiatrist said that he had entered into a contract with the employee to continue to take his medication and to call if he felt suicidal again. With these safeguards, the psychiatrist stated that the employee could be returned to the laboratory, but declined to give any prediction about future suicide feelings. The employee was (reluctantly) returned to the lab.

c. When a direct threat case arises, it may be best to put the employee on immediate paid leave pending further investigation. The risk to the employee and others outweighs the possibility of ADA liability. It is permissible to require medical examination, verification of any disability, and suggestions for possible accommodation.

d. Even when a direct threat is present, the employer must consider whether any reasonable accommodation is possible to eliminate the risk or reduce it to an acceptable level.

C. Leaves of Absence: Interface Between the ADA and the FMLA

a. The ADA may require leaves of absence from work as potential reasonable accommodations for covered disabilities. The Family Medical Leave Act (FMLA) 29 U.S.C. § 2601-2654 (Interim regulations at 29 CFR § 825.102(a)), mandates that an employer provide up to twelve weeks of unpaid leave each year for eligible employees for the birth, adoption or foster placement of a child, for the care of a covered family member with a serious health condition, or for the employee's own serious health condition. Complying with and reconciling these two statutes may present difficulties for employers.

b. The definition of disability under the ADA and serious health condition under the FMLA are not the same. To be protected by the ADA, the employee must have a physical or mental impairment that substantially limits a major life activity. The qualifying condition for FMLA is much more expansive. To qualify for FMLA leave, the employee must have a serious health condition that makes him or her unable to perform the functions of the job. "Serious health condition" is defined as "an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility, or (B) continuing treatment by a health care provider. Therefore, a serious viral infection or appendectomy may qualify the employee for FMLA leave, but is unlikely to be a disability for ADA purposes.

c. Unlike the ADA, the FMLA has no undue hardship defense.

d. It seems likely that employers may be required to provide leave time as a reasonable accommodation under the ADA to an employee who has already taken FMLA leave unless to do so would be an undue burden.

e. Reinstatement rights are different under the ADA and the FMLA. Under the ADA, the employer would be required to provide leave as a reasonable accommodation and return the employee to the job if he/she was qualified to perform it with reasonable accommodation. If it is a demonstrable undue hardship to hold the job or the employee is no longer able to perform it, the employer must consider transferring the employee to another position as a reasonable accommodation. Under the FMLA, an employee must be returned to the job previously held or "an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." The employer does not have to establish an undue hardship to transfer the employee to an equivalent position.

f. Another big issue for employers is coping with the FMLA requirement that employees be permitted to take FMLA leave on an intermittent basis. Thus, an employee could take leave as an ADA reasonable accommodation and when he/she returned to work would be entitled (without consideration of undue hardship) to work a reduced schedule or take intermittent up to a maximum of twelve weeks per year. Under the FMLA, the employer is entitled to temporarily transfer an employee requesting intermittent leave or a reduced schedule to a position for which he/she is qualified, that has equivalent pay and benefits, and that better accommodates the leave. Such a transfer would be prohibited by the ADA if the person remained qualified for the original job and holding the job open could not be shown to be an undue hardship.

U.S. Department of Justice
Civil Rights Division
Public Access Section

Enforcing the ADA

A Status Report Update from the Department of Justice

(July-September 1994)

This Status Report Update covers the ADA activities of the Department of Justice during the third quarter (July-September) of 1994. Copies of the April 4, 1994, Status Report (which summarizes all activities up to that date) and the April-June 1994 Update are available through our ADA Telephone Information Line (see page 9).

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The Americans with Disabilities Act (ADA) is a comprehensive civil rights law for people with disabilities. The Department of Justice enforces the ADA's requirements in three areas -

Title I: Employment practices by units of State and local government

Title II: Programs, services, and activities of State and local government

Title III: Public accommodations and commercial facilities

I. Enforcement

Through lawsuits and both formal and informal settlement agreements, the Department has achieved greater access for individuals with disabilities in nearly 300 cases. Under general rules governing lawsuits brought by the Federal Government, the Department of Justice may not file a lawsuit unless it has first unsuccessfully attempted to settle the dispute through negotiations.

A. Litigation

1. Consent decrees

Some litigation is resolved at the time that the suit is filed or afterwards by means of a negotiated consent decree. Consent decrees are monitored and enforced by the Federal court in which they are entered.

Title III

United States v. Jack H. Castle, D.D.S., Inc. d/b/a Castle Dental Center - In the first AIDS-related settlement with a dental service under the ADA, a Houston dental office will pay $100,000 in damages and penalties for refusing to treat a patient who revealed that he was HIV-positive. Under the proposed consent order defendant Castle Dental Center, a large chain of dental offices in the Houston area, will pay $80,000 in compensatory damages to a person who was denied dental services because of HIV status, the largest amount of damages obtained to date by the Department on behalf of a complainant. The owner of the Center and its management company will each pay a $10,000 civil penalty to the Federal Government. The defendants will also provide full and equal services to persons with HIV or AIDS, train their staff in nondiscriminatory treatment of persons with HIV or AIDS, and send periodic reports to the Department so that compliance with the order can be monitored.

2. Amicus briefs

The Department files briefs in selected ADA cases in which it is not a party in order to guide courts in interpreting the ADA.

Title II

Helen L. v. Didario - The Department filed an amicus brief in the U.S. Court of Appeals for the Third Circuit challenging the Pennsylvania Department of Public Welfare's (DPW) refusal to provide attendant care services to an individual with a mobility impairment who needs such services in order to live at home with her two children. In order to obtain the assistance that she needs, she was required to enter a DPW-maintained nursing home even though she does not need nursing care. Pennsylvania agrees that the most appropriate setting for the plaintiff is in the attendant care program. The State also agrees that attendant care for the plaintiff in her home would cost Pennsylvania $9,300 less per year than nursing home care. However, the State asserts that the attendant care program is underfunded and that the plaintiff must continue on the waiting list. The Department's brief argues that the title II regulation, which requires public entities to provide services in the most integrated setting appropriate to the needs of the individual with a disability, mandates, in this particular situation, that the plaintiff be permitted to enter the attendant care program.

Amicus Briefs

Clark v. Virginia Board of Bar Examiners -- The Department filed an amicus brief supporting a challenge to inquiries into past treatment for mental illness made by the Virginia Board of Bar Examiners in certifying candidates for admission to the Virginia Bar. The court had earlier ruled that it lacked jurisdiction to consider a challenge to the State's bar admission procedures. It also held that the plaintiff had not presented enough evidence as to her mental health condition to establish that she was an individual with a disability who would be entitled to bring an ADA lawsuit on this issue. After the Department filed its amicus brief in support of plaintiff's motion for the court to reconsider its decision, the court reversed its earlier ruling. It agreed with the Department's position that it did indeed have jurisdiction over the plaintiff's claims and that she had "standing" to bring the lawsuit. The case will now proceed to trial.

Ellen S. v. Florida Board of Bar Examiners -- In another bar examiner case challenging mental health inquiries, the U.S. District Court for the Southern District of Florida rejected the Florida Board of Bar Examiners motion to dismiss, as urged by the Department in its June 29, 1994, amicus brief.

Livingston v. Guice -- The Department filed an amicus brief with the U.S. Court of Appeals for the Fourth Circuit in support of plaintiff's appeal in a title II suit against the State of North Carolina and a State court judge. The suit, brought by a person who uses a wheelchair, charges that the State of North Carolina and a State court judge violated title II of the ADA by preventing the plaintiff from entering a courtroom through the only accessible entrance known to her. The U.S. District Court for the Western District of North Carolina had dismissed the case on the grounds of judicial immunity. The Department's brief in the Fourth Circuit argues that, under Supreme Court judicial immunity cases and the ADA, the State judge is not immune from the claim for injunctive relief made in this case and that the State is not immune from the claim for monetary damages.

LRCAB v. Laconia, New Hampshire -- This case involved a challenge to a city zoning board's decision to deny a special use permit that would have allowed the operation of a center providing services for homeless persons with mental illness. The Department filed an amicus brief arguing that zoning actions can be challenged under title II of the ADA and that the court should not abstain pending a state court review of the zoning decision. The court then issued an order declining to abstain but deferred ruling on the issue of whether zoning decisions are covered by title II.

Amicus Briefs

Title III

Fiedler v. American Multi-Cinema, Inc. -- The Department filed an amicus brief with the U.S. District Court for the District of Columbia arguing that existing motion picture theaters with more than 300 seats must disperse wheelchair seating locations to the extent it is readily achievable to do so. The plaintiff, a person with a mobility impairment who uses a wheelchair, sued American Multi-Cinema, Inc., claiming that its practice of providing only two wheelchair seating locations in the last row of a 374-seat motion picture theater in Union Station in Washington, D.C., violated the ADA. The Department's brief also argues that the privately operated movie theater at issue is a covered place of public accommodation under title III even though it is housed in leased space in a facility owned by the Federal Government. In addition, the brief challenges the defendant's assertion that wheelchair users seated somewhere other than in the last row of an existing theater would always constitute a "direct threat" to the health and safety of other patrons in the event of an emergency.

***Posner* Dismissed without Ruling on Religious Exemption** -- The Department intervened in *Posner v. Central Synagogue* to defend the constitutionality of title III's religious exemption in a case alleging violations of the ADA by a synagogue nursery school. The U.S. District Court for the Southern District of New York granted summary judgment for the defendant without deciding the constitutional issue.

IHOP Case Moot Because of Restaurant Fire -- The Department intervened in *Pinnock v. International House of Pancakes*, a suit alleging that a San Diego restaurant failed to engage in readily achievable barrier removal, in order to defend the constitutionality of title III of the ADA. In October 1993, the district court ruled in the Department's favor and granted summary judgment to the United States on the constitutional issues. Because the restaurant was destroyed by fire, the U.S. Court of Appeals for the Ninth Circuit dismissed the defendant's appeal as moot.

B. Formal Settlement Agreements

The Department sometimes resolves cases without filing a lawsuit, by means of formal written settlement agreements.

Title II

Los Angeles, California -- The City of Los Angeles has agreed to take major steps to improve the accessibility of its 9-1-1 emergency telephone services to persons who use telecommunication devices for the deaf (TDD's). The formal agreement resolves a complaint alleging that the City failed to respond to a 9-1-1 call made by a mother who is deaf. After her two-year-old son suffered a head injury, the mother called 9-1-1 on a TDD. After three tries to reach the 9-1-1 center by TDD, she gave up and took her son to the hospital herself. In the settlement agreement, the City agreed to install TDD-compatible equipment at approximately 30 answering stations; properly maintain this equipment and provide emergency backup equipment; provide training for emergency services call-takers in the proper operation of TDD's; and undertake a public education program to promote the use of 9-1-1 by individuals who use TDD's.

Assistant Attorney General Deval L. Patrick has sent a letter to 250 mayors informing them of the Los Angeles / 9-1-1 agreement and reminding them of their obligation to provide direct access for TDD users to their 9-1-1 systems.

Pinellas County, Florida -- The Pinellas County Sheriff's Office entered a formal agreement involving auxiliary aids issues. The agreement resolves a complaint alleging that the Sheriff's Office did not secure the services of a qualified interpreter for an inmate who was deaf and failed to provide him with a TDD so that he could make outgoing calls. The Sheriff's Office agreed to maintain the additional TDD's that it purchased, to permit inmates and visitors to have access to 800 numbers for the purpose of making calls through telephone relay services, and to establish procedures for securing the services of qualified interpreters whenever necessary to ensure effective communication with individuals who are deaf or hard-of-hearing.

Formal Settlement Agreements

Minnehaha County, South Dakota -- In the first settlement agreement involving public fairs, Minnehaha County has agreed to a wide range of measures to ensure accessibility at the Sioux Empire Fair. The County has agreed to renovate several bathrooms, install two TDD's at pay phones, create an accessible path of travel through the livestock barns and other areas at the fairgrounds, install and upgrade accessible parking, make the vending and ticketing counters and booths accessible, provide materials to Fair volunteers and patrons regarding the accommodations available for disabled patrons, and adopt a policy that equalizes the number of companion tickets to Fair concerts that patrons with mobility impairments can buy as compared to other patrons.

Title III

Avis Inc., Garden City, New York -- Through a negotiated settlement agreement, the Department resolved its investigation of Avis, Inc., the country's second largest car rental establishment. Under the agreement, Avis has committed to providing rental vehicles equipped with hand controls to persons with disabilities at all corporately-owned locations. Hand controls will be available on eight hours' notice in all major airport locations and on 24 or 48 hours' notice at other facilities, depending on certain factors. Avis agreed to provide training at all corporate locations. Avis will urge all existing licensees to adopt the same measures, and will require all new franchisees and those renewing their contracts to follow the agreement. The agreement also references two previously-resolved investigations, where Avis has made substantial changes to its rental policies to accommodate persons with disabilities. When renting to persons who do not use credit cards, Avis will allow persons who are unemployed due to a disability to substitute verifiable disability-related income in lieu of a verifiable employment history. Also, persons who cannot drive due to a disability will now be able to rent cars in their own name and maintain financial responsibility for a car rental when they are accompanied by a licensed driver.

C. Other settlements

The Department resolves numerous cases without litigation or a formal settlement agreement. In some instances, the public accommodation, commercial facility, or State or local government promptly agrees to take the necessary actions to achieve compliance. In others, extensive negotiations are required. Following are some examples of what has been accomplished through informal settlements.

Title II

Access to facilities

- A Kentucky county court agreed to adopt and publicize a policy requiring court proceedings to be relocated to an accessible location upon reasonable notice from a person with a mobility impairment.
- A small New York town agreed to provide accessible paths from parking to viewing positions at its public baseball fields and install power-assisted doors and accessible water fountains and restrooms in its town hall.

Other Settlements

- A Colorado county agreed to provide for accessibility at its courthouse by making changes to its elevator and restrooms.

Policies and procedures

- A west coast State committee of bar examiners agreed to provide an additional testing day for the July 1994 bar exam for an individual with a learning disability.

Title III

Access to facilities

- A Manchester, New Hampshire, pub installed a ramp at its front entrance.
- The owners of a Denver fast food establishment regraded an area of the parking lot to make it level with the restaurant's entrance and installed two accessible parking spaces.
- A Pensacola, Florida, restaurant located on the second floor of a two-story building agreed to make all menu selections from the second floor restaurant available at an accessible location on the first floor of the facility at no additional charge.
- A gift shop in a small town in Minnesota agreed to install a ramp to the front entrance.
- A California museum built a new accessible unisex restroom and modified another set of restrooms to have an accessible stall, lavatory, and other elements.
- A Colorado inn built a ramp at one of the inn's entrances.
- A small town Louisiana fast food chain restaurant relocated its accessible parking spaces so that they are directly in front of the entrance.
- The owners of a medical office building in a small town in Louisiana provided three accessible parking spaces and ramps to a walkway that had formerly impeded access.
- An auto supply store in a small Indiana town removed posts that were barriers to its check-out aisle.

- An upstate New York athletic club agreed to install a ramp to its indoor running track area and to make its weightlifting equipment accessible.

Other Settlements

- A Colorado-based rental car company purchased universal hand controls for its rental car fleet and made cars equipped with these controls available on two days' or less notice under most circumstances. The company also modified its policies so that persons with disabilities no longer have to "test drive" hand control equipped rental cars.

- A Wyoming outlet of a national chain of discount department stores restriped its parking lot to provide accessible spaces, installed automatic entrance doors, and agreed to modify its lunch counter to be accessible.

- The owners of two motels in Branson, Missouri, restriped the motels' parking lots to have accessible parking spaces on the shortest accessible route to rooms and amenities, and installed curb ramps.

- A restaurant in a small town in North Carolina, part of a national family restaurant chain, restriped the parking lot to have accessible spaces on the shortest accessible route to the building entrance.

- The Des Moines, Iowa, affiliate of a nationwide rental car company will provide hand controls for persons with disabilities.

Effective communication

- The operators of a multiplex motion picture theater in New York City acquired a permanently installed assistive listening system for each of its six auditoriums and purchased receivers for these systems equal in number to at least four percent of the available seats.

- An Idaho ski resort lodge acquired equipment necessary to make seven of its rooms accessible to persons with hearing impairments, acquired a TDD for its front desk so that customers who use TDDs will have access to in-room services available to other customers, and agreed to provide training to its staff in the proper use of the equipment.

- A Missouri hotel is now providing TDD's and other devices to hotel guests who have hearing impairments.

Policies and procedures

- Seven gas stations in western States agreed to pump gasoline at no extra charge for persons with disabilities (when there is more than one attendant on duty) and to post signs at the pumps notifying customers of this service.

D. Investigations

The Department is currently investigating nearly 1100 complaints against public accommodations and commercial facilities under title III. The Department also, on its own initiative, is reviewing plans for new construction and alterations of various types of facilities in locations around the country.

In addition, the Department is currently investigating nearly 1400 complaints against units of State and local government under title II. Seven other Federal agencies are also investigating title II complaints and may refer cases to the Department of Justice for litigation.

The Department also has a number of investigations under way under title I against public employers. (Enforcement of title I against private employers is handled by the Equal Employment Opportunity Commission.)

II. Certification of State and Local Building Codes

The ADA authorizes the Department of Justice to certify State or local laws or building codes that meet or exceed the ADA's accessibility requirements. This is a voluntary program in which States and localities can choose to participate. In a jurisdiction whose law or code has been certified, when a new public accommodation or other commercial facility is built or an existing facility is altered or expanded, compliance with the local regulations will give the building owner and other responsible parties rebuttable evidence of compliance with the ADA if the building's accessibility is later challenged under the ADA.

In July 1994, the Department notified the State of Washington that its review has revealed a few remaining areas in which the Washington code is not fully equivalent to the ADA and indicated that, upon correction of those problems, a preliminary certification of the code could be issued. The Washington request was the first request for certification received by the Department. The Department's initial review revealed that the Washington accessibility code, although very progressive, was not fully equivalent to the ADA. Therefore, the Department provided substantial technical assistance to assist the State to make its code equivalent. The State of Washington is now proposing to amend its code to correct the problems identified by the Department. This process is expected to be completed by mid-November.

Requests for certification have also been received from New Mexico, Utah, Florida, and the City of New York. Technical assistance has been requested by the Council of American Building Officials (CABO) on behalf of the American National Standards Institute (ANSI) A117.1 committee, the Building Officials and Code Administrators International (BOCA), and the National Parking Association.

Title II Proposed Rule

The Department of Justice is now reviewing the comments on its proposed rule to amend title II's accessibility standards for new construction and alterations. The public comment period closed on August 19, 1994. The proposed rule would adopt the ADA Accessibility Guidelines as the ADA Standards for Accessible Design for new construction and alterations covered by title II. Under the proposed amendment, title II entities would no longer have the option to apply the Uniform Federal Accessibility Standards.

The proposed rule would also amend the ADA Standards in several ways and add sections 11 through 14 dealing with judicial, legislative, and regulatory facilities, detention and correctional facilities, residential housing, and public rights-of-way. Finally, the proposal would publish the amended ADA Standards for Accessible Design as part 38 of 28 C.F.R., deleting them from Appendix A of part 36 of 28 C.F.R., and would amend title III to refer to part 38.

III. Technical Assistance

The ADA requires the Department of Justice to provide technical assistance to entities and individuals with rights and responsibilities under the ADA. The Department encourages voluntary compliance by providing education and technical assistance to business, industry, government, and members of the general public through a variety of means.

ADA Telephone Information Line

The Department of Justice now provides toll-free "800" service for both voice and TDD callers who have questions about title II and title III of the ADA, including the Standards for Accessible Design. Under its expanded hours of operations, operators may be reached from 10:00 a.m. to 6:00 p.m. (EDT), Monday through Friday (except Thursdays, 1:00 p.m. to 6:00 p.m.). The system has been upgraded to accommodate a larger number of callers simultaneously and to provide Spanish language service. Callers may hear recorded information and order materials at any time day or night. **The information line numbers are:**

Nationwide
1-800-514-0301 (voice)
1-800-514-0383 (TDD)

Washington, D.C., area
202-514-0301 (voice)
202-514-0383 (TDD)

Grants

Section 506 of the ADA requires the Department to provide technical assistance to entities and individuals affected by title II and title III of the ADA. This section also authorizes the Department to award grants for the purpose of supplementing the Department's technical assistance efforts.

Under the 1994 Technical Assistance Grant Program, the Department awarded ten grants to the following organizations:

Access Video Fund -- to develop, produce, and distribute a 30-minute documentary, to be aired nationally, to educate the public on the ADA, dispel myths and stereotypes about people with disabilities, and illustrate the positive impact of the ADA on the lives of people with disabilities.

The Arc -- to produce educational materials for police departments and courts about the rights of persons with mental retardation in law enforcement and judicial proceedings; and to continue to reach out to small businesses across the country, to conduct ADA training sessions, and to operate a toll-free ADA technical assistance line that provides information to Spanish-speaking entities and individuals.

Home Builders Institute -- to distribute ADA educational materials produced by the Department of Justice to 190,000 local building contractors, construction tradespeople, and individuals in construction training programs throughout the country.

Key Bridge Foundation -- to train 90 professional mediators in Dallas-Fort Worth, Detroit, Los Angeles, New York, and Orlando-Tampa on the ADA, develop a consumer and mediator guide, and mediate up to 600 ADA complaints.

The National Trust for Historic Preservation -- to develop and distribute an ADA self-study course for the 1,863 local historic preservation commissions and boards throughout the country to assist in identifying accessibility issues and practical solutions for providing access without destroying a building's historic character.

Adaptive Environments -- to continue a project incorporating universal design concepts and specific ADA "how-to" materials into the curricula of architecture, interior design, industrial design, and landscape architecture schools and programs across the country.

Chief Officers of State Library Agencies (COSLA) -- to expand upon a project that placed ADA materials in 15,000 libraries throughout the country, with an emphasis on ADA videotapes, Spanish translations of ADA material, and additional documents developed by the Department's prior grantees.

Disability Rights Education and Defense Fund (DREDF) -- to continue to operate a toll-free ADA information line (1-800-466-4232 (voice & TDD)) to assist persons with disabilities and covered entities with inquiries about the requirements of the ADA, increasing the availability of technical assistance throughout the country, especially for citizens living in the Mountain and Pacific time zones.

Police Executive Research Forum (PERF) -- to expand educational materials for police officers about persons who are deaf, persons with epilepsy, and persons with mental illness.

Publications

Copies of the Department of Justice's regulations for titles II and III of the ADA, the ADA Questions and Answers booklet, the ADA Handbook (limited quantities available), and information about the Department's technical assistance grant program can be obtained by calling the Department's toll-free ADA Telephone Information Line at the number listed above or writing to the address listed below. These materials are available in standard print, large print, Braille, audiotape, and computer disk.

U.S. Department of Justice
Civil Rights Division
Public Access Section
Post Office Box 66738
Washington, D.C. 20035-6738

These materials are also available through the Department of Justice's ADA electronic bulletin board at 202-514-6193.

Copies of the Department of Justice's Technical Assistance Manuals for titles II and III and yearly updates can be obtained by subscription from the Government Printing Office. The subscription for the Title II Manual, which includes annual supplements through 1996, costs $24. The subscription for the Title III Manual with supplements through 1996 costs $25. Call the ADA Telephone Information Line to obtain an order form.

Copies of legal documents and settlement agreements mentioned in this publication can be obtained by writing to:

Freedom of Information/Privacy Act Branch
Civil Rights Division
Administrative Management Section
P.O. Box 65310
Washington, D.C. 20035-5310

Attorney General Launches National Public Education Campaign

As part of its continuing effort to educate Americans about the ADA, the Justice Department has launched a major national public education campaign. The campaign, which seeks to increase awareness of the landmark law and encourage voluntary compliance, includes distributing public service announcements to media markets and informational kits to libraries across the country.

The public service announcements, which include both radio and television spots, feature Attorney General Janet Reno stressing the importance of the law. The following 60-second radio spot, entitled "Getting In the Door," will be distributed to over 1,000 radio stations:

BACKGROUND:

- Martin Luther King saying, "I have a dream."

ATTORNEY GENERAL JANET RENO:

- "Talk about "civil rights" and people think about a lot of things ... Martin Luther King, the March on Washington, the women's fight for equality.
- But for *one out of seven* Americans, equality means just being able to get in the door, make a phone call, hear a movie, or get a job.
- Now, thanks to the Americans with Disabilities Act, the simplest things in life are no longer barriers to America's 49 million people with disabilities.
- I'm Janet Reno, U.S. Attorney General. If you're not sure what's required under the Americans with Disabilities Act, please call 1-800-514-0301 or visit your local library.
- Again, that's 1-800-514-0301.
- Because the ADA isn't just the way things *should* be -- now it's the *law*."

Two other television spots, which run for 30 and 15 seconds, will be distributed to over 1,800 television stations.

Additionally, the Justice Department is providing 15,000 public libraries with an "ADA Information File." The file was developed and distributed with the help of the Chief Officers of State Library Agencies.

In announcing this educational effort at Washington's Martin Luther King Library, Reno stated that "the library is the center of community life where people from all walks of life go to get the information they need." The file includes over 30 documents offering general information on the ADA's requirements as well as specific information on how various entities can comply with the law. The documents were developed by the Department of Justice and its grantees and other Federal agencies.

To ensure the success of the campaign, the Justice Department will ask citizens to encourage television and radio stations in their communities to air the public service announcements. If a station has not already received the announcements, please contact Lee Douglass, Department of Justice Office of Public Affairs at (202) 616-2765.

IV. Other Sources of ADA Information

The *Equal Employment Opportunity Commission* offers technical assistance to the public concerning title I of the ADA.

For ordering documents
1-800-669-3362 (voice)
1-800-800-3302 (TDD)

For questions
1-800-669-4000 (voice)
TDD: use relay service

* * *

The *U.S. Department of Transportation* offers technical assistance to the public concerning the public transportation provisions of title II and title III of the ADA.

ADA documents and general questions
202-366-1656 (voice)
202-366-4567 (TDD)

ADA legal questions
202-366-1936 (voice)
202-366-0748 (TDD)

Complaints and enforcement
202-366-2285 (voice)
202-366-0153 (TDD)

National Easter Seal Society
"Project Action" grant
202-347-3066 (voice)
202-347-7385 (TDD)

* * *

The *Federal Communications Commission* offers technical assistance to the public concerning title IV of the ADA.

ADA documents and general questions
202-418-0500 (voice)
202-632-6999 (TDD)

ADA legal questions
202-634-1808 (voice)
202-632-0484 (TDD)

Complaints and enforcement
202-632-7553 (voice)
202-632-0485 (TDD)

* * *

The *U.S. Architectural and Transportation Barriers Compliance Board, or "Access Board,"* offers technical assistance to the public on the ADA Accessibility Guidelines.

ADA documents and questions
1-800-872-2253 (voice)
1-800-993-2822 (TDD)
202-272-5434 (voice)
202-272-5449 (TDD)

* * *

The *National Institute on Disability and Rehabilitation Research (NIDRR)* of the U.S. Department of Education has funded centers in ten regions of the country to provide technical assistance to the public concerning title I, title II, and title III of the ADA.

ADA technical assistance nationwide
1-800-949-4232 (voice & TDD)

* * *

The *Job Accommodation Network (JAN)* is a free telephone consulting service funded by the President's Committee on Employment of People with Disabilities. It provides information and advice to employers and people with disabilities on reasonable accommodation in the workplace.

Information on workplace accommodation
1-800-526-7234 (voice & TDD)

V. How to File Complaints

Title I

Complaints about violations of title I (employment) by units of State and local government or by private employers should be filed with the Equal Employment Opportunity Commission. Call 1-800-669-4000 for the field office in your area.

Title II

Complaints about violations of title II by units of State and local government should be filed with -

U.S. Department of Justice
Civil Rights Division
Coordination and Review Section
Post Office Box 66118
Washington, D.C. 20035-6118
202-307-2222 (Voice)
202-307-2678 (TDD)

Title III

Complaints about violations of title III by public accommodations and commercial facilities should be filed with -

U.S. Department of Justice
Civil Rights Division
Public Access Section
Post Office Box 66738
Washington, D.C. 20035-6738

CONSTRUCTIVE DISCHARGE AND "REASONABLE ACCOMMODATION" UNDER THE AMERICANS WITH DISABILITIES ACT

KATHRYN A. JOHNSON

The Americans with Disabilities Act of 1990 ("ADA"),[1] like other federal anti-discrimination legislation,[2] prohibits employers[3] from discriminating against protected individuals–under the ADA, "qualified individual[s] with a disability."[4] Qualified individuals are protected from all discriminatory acts of the employer–not just termination of or refusal to hire a disabled person.[5] The Equal Employment Opportunity Commission ("EEOC") is responsible for enforcing the employment provisions of the ADA,[6] and claims of discrimination are subject to the same investigative and administrative processes as claims arising under Title VII.[7]

The classic employment discrimination case[8] arises when an employer either fires or refuses to hire a protected individual. In these situations the plaintiff pursues his or her remedy while outside the influence of the employer. In contrast, an employee subjected to discriminatory treatment on the job must pursue relief while still employed by the discriminating entity.

An employer sometimes retaliates against an employee who files a grievance,[9]

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[1] 42 U.S.C. §§ 12101-12213 (Supp. III 1991).

[2] *See, e.g.*, Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. §§ 701-796 (1988 & Supp. III 1991); Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991); Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1988 & Supp. III 1991).

[3] The ADA refers to "covered entities," which includes the term "employer." 42 U.S.C. § 12111(2). Employers with 25 or more employees are currently within the scope of the ADA. Employers with 15 or more employees will come within the scope of the ADA's coverage on July 26, 1994. Employers with fewer than 15 employees are exempt from the ADA. *Id.* § 12111(5).

[4] The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8).

[5] A covered entity may not discriminate against an individual with a disability "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* § 12112(a).

[6] *Id.* § 12117(a), (b).

[7] The ADA incorporates the "powers, remedies, and procedures" of the Civil Rights Act. *Id.* § 12117.

The pursuit of relief through the EEOC, and often subsequently through the federal courts, is quite lengthy and complex, and beyond the scope of this comment. Sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of the Civil Rights Act of 1964 detail the requirements which must be met.

[8] Cases of intentional discrimination against individuals are "disparate *treatment* cases" subject to the burdens of production and proof as outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (emphasis added). In contrast, "disparate *impact* cases" involve an employer policy, seemingly neutral on its face, which adversely affects protected individuals as a class. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). This article focuses only on the disparate treatment of qualified individuals with a disability.

[9] *See, e.g.*, Womack v. Munson, 619 F.2d 1292 (8th Cir. 1980) (retaliatory discharge).

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even though retaliation is also a prohibited form of discrimination.[10] If an employer does retaliate or otherwise discriminate, the work environment may become so oppressive and intolerable that the employee will quit. The constructive discharge doctrine, developed under the National Labor Relations Act,[11] and later recognized in employment discrimination cases,[12] may afford relief to victims of discrimination who quit their jobs due to intolerable working conditions.

If the employee was not constructively discharged, he is not entitled to the remedies of back pay, reinstatement or front pay,[13] or other damages, even if the court finds that the employer engaged in discriminatory practices prior to the employee's resignation. This comment examines whether an employee who quits work due to an employer's failure to provide "reasonable accommodation"[14] can claim he was constructively discharged, and thus gain relief under the ADA. An understanding of reasonable accommodation, "undue hardship," and other key ADA terms is a prerequisite to this exploration, and these terms are discussed in Part I. Part II examines the constructive discharge doctrine and its application under other employment discrimination statutes. Part III addresses questions that arise as a result of applying the constructive discharge doctrine to the ADA, and supplies tentative answers.

I. REASONABLE ACCOMMODATION AND UNDUE HARDSHIP

Under the ADA, an employer who fails to provide reasonable accommodation for the known physical or mental limitations of a qualified individual with a disability commits unlawful discrimination, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business.[15] To determine whether the failure to provide reasonable accommodation is an unlawful discriminatory practice requires an understanding of the terms of this prohibition.[16]

A. *Qualified Individual With a Disability*

A qualified individual is able to perform the essential functions of the job held or desired.[17] A determination of whether an individual with a disability is "qualified" is a two-step process.[18] First, a qualified individual must meet the requisite skill, experience, education, and other job-related requirements.[19] This is an objective test, and it is relatively easy to determine if a person has the necessary qualifications. If this first part of the test is met, the second step is to determine whether the individual can perform the essential functions of the job, either with or without reasonable accommodation.[20] Essential functions of a job are "fundamental job duties of the employment position."[21] The purpose of this requirement is to ensure that qualified individuals with a disability are not denied employment opportunities merely because of an inability to perform *marginal* functions of the position.[22] Once it is determined that an applicant or employee is a qualified individual with a disability, the employer has an obligation to provide a reasonable accommodation.[23]

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[10] 29 C.F.R. § 1630.12 (1993) (regulating the ADA); 42 U.S.C. § 2000e-3(a) (1988 & Supp. III 1991); 29 U.S.C. § 623(d) (1988 & Supp. III 1991).

[11] 29 U.S.C. §§ 151-169 (1988 & Supp. 1991) (statutory support for the constructive discharge doctrine at § 158(a)(3)).

[12] *See infra* notes 72-80 and accompanying text.

[13] An award of future lost earnings in Title VII cases is an alternative to the traditional equitable remedy of reinstatement. Goss v. Exxon Office Sys. Co., 747 F.2d 885 (3d Cir. 1984).

[14] *See infra* notes 24-34 and accompanying text for a discussion of reasonable accommodation.

[15] 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a) (1993).

[16] The ADA takes many of its definitions and requirements from the Rehabilitation Act. An examination of the meaning of the terms used in the ADA cannot be accomplished without reference to the Rehabilitation Act and cases decided under that Act.

B. *Reasonable Accommodation*[24]

"The obligation to make reasonable accommodation is a form of non-discrimination."[25] Reasonable accommodation includes "modifications or adjustments to the work environment, or to the manner or circumstances under which the position . . . is customarily performed, that enable a qualified individual with a disability to perform the essential functions" of the job.[26] Accommodation also includes modifications or adjustments that allow a current employee "to enjoy equal benefits and privileges of employment" as enjoyed by other non-disabled employees.[27] An employer need not provide modifications that the disabled employee would ordinarily obtain for himself, or that are primarily for the personal benefit of the disabled worker.[28]

The ADA lists possible ways an employer may meet the accommodation requirement;[29] this list is not exhaustive,[30] but provides guidance about the nature of the obligation. Choosing and implementing an accommodation should be a "flexible, interactive process that involves both the employer and the qualified individual with a disability."[31] The regulations suggest a four-part process that involves: (1) analyzing the job to determine its essential functions; (2) ascertaining the precise job-related limitations imposed by the individual's disability; (3) identifying potential accommodations and assessing their effectiveness; and (4) implementing the accommodation that is most appropriate for both the employer and employee (while considering the employee's preference).[32] A reasonable accommodation need not be the "best" accommodation possible, nor the one that the employee prefers.[33] Whether or not an employer must provide the accommodation depends on various factors, including cost of accommodation and the overall financial resources of the employer.[34]

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[17] *See supra* note 4.

[18] 29 C.F.R. app. § 1630.2(m) (1993).

[19] 29 C.F.R. § 1630.2(m) (1993).

[20] *Id.*

[21] *Id.* § 1630.2(n)(1).

[22] 29 C.F.R. app. § 1630.2(m) (citing H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 55 (1990)).

[23] 29 C.F.R. § 1630.9.

[24] Reasonable accommodation under the ADA and the Rehabilitation Act is *not* the same as reasonable accommodation of religious beliefs required by Title VII of the Civil Rights Act. Religious accommodation is "de minimis," while accommodation of disabled individuals is more comprehensive. *See infra* note 40 and accompanying text.

[25] 29 C.F.R. app. § 1630.9.

[26] 29 C.F.R. § 1630.2(o)(ii).

[27] *Id.* § 1630.2(o)(iii).

[28] For example, an employer would not normally have to supply eyeglasses to an employee. However, an employer may have to provide an individual with a disabling visual impairment with eyeglasses specifically designed to enable the individual to use the office computer monitors, but that are not otherwise needed by the individual outside of the office. 29 C.F.R. app. § 1630.9.

C. *Undue Hardship*

An employer may defend an accusation of discrimination by showing that a requested accommodation constitutes an undue hardship for the employer.[35] "This provision [undue hardship] is derived from and should be applied consistently with interpretations by Federal Agencies applying the term set forth in regulations implementing . . . the Rehabilitation Act of 1973."[36] In general, "undue hardship" means "significant difficulty or expense incurred by a covered entity."[37] This includes any action that will fundamentally alter the nature of the business, as well as accommodations that are unduly costly, extensive, substantial, or disruptive.[38] Under the ADA, a requested accommodation must be more than de minimis to relieve the employer from liability.[39] Congress specifically rejected the de minimis standard adopted in religious accommodation cases under Title VII.[40]

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[29] 42 U.S.C. §12111(9) provides that:

> The term "reasonable accommodation" may include:
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modifications of equipment or devices, appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

See also 29 C.F.R. app. § 1630.2(o).

[30] 29 C.F.R. app. § 1630.2(o) (1993).

[31] *Id.* § 1630.9 (1993).

[32] *Id.*

[33] *Id.*

[34] *See infra* note 41 and accompanying text.

[35] *See supra* note 15.

[36] H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 67 (1990).

[37] 29 C.F.R. § 1630.2(p).

[38] 29 C.F.R. app. § 1630.2(p).

[39] H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 68 (1990).

[40] *Id.* In Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), the Court held that an employer need incur no more than a *de minimis* expense to reasonably accommodate the religious beliefs of an employee.

An employer's claim that an accommodation is an undue hardship is considered in light of certain factors: (1) the nature and cost of the accommodation; (2) the overall financial resources of the facility; (3) the overall financial resources of the covered entity, with respect to the number of its employees and the number, type, and location of its facilities; (4) the type of operation of the covered entity; and (5) the impact of the accommodation on the operation of the facility, including the impact on the ability of other employees to perform their jobs.[41] Few cases have addressed the issue of what constitutes undue hardship under the ADA; however, the issue has been addressed in Rehabilitation Act cases, which serve as a guideline in interpreting the ADA requirements.

A disabled individual must be qualified for the position sought before a finding of discrimination can be made.[42] Because an individual is qualified if he can meet the essential functions of the job with reasonable accommodation, cases usually turn on whether the accommodation sought creates an undue hardship for the employer. If an employee shows that reasonable accommodation of his disability is possible, the employer bears the burden of proving the requested accommodation would cause undue hardship.[43]

There are two major classifications of undue hardship under the Rehabilitation Act: modifications that change the essential nature or operation of the business, and modifications that involve excessive cost.[44] If an employer presents evidence that a particular accommodation is not reasonable, the burden shifts back to the employee to produce evidence concerning her individual capabilities and to make suggestions for possible alternative accommodations.[45] A Third Circuit decision, *Strathie v. Department of Transportation*,[46] illustrates a plaintiff's efforts to provide suggested accommodations.

Strathie, a hearing impaired individual, trained for and received a school bus driver's license in Pennsylvania. After one day as a bus driver, the Department of Transportation suspended Strathie's license until his competency could be established.[47] Strathie violated Department regulations because he wore a hearing aid, even though his hearing with the aid was within the Department's requirements.[48] It was undisputed that Strathie met the definition of a handicapped person and that his license was suspended solely because of his handicap.[49] Strathie claimed that he was a qualified individual with a disability.[50]

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[41] 29 C.F.R. § 1630(p)(2).

[42] *See supra* notes 18-20 and accompanying text.

[43] 29 C.F.R. § 1639.9(a). The burden of proving inability to accommodate always remains on the employer. Prewitt v. United States Postal Serv., 662 F.2d 292, 308 (5th Cir. 1981).

[44] 29 C.F.R. § 1630.2(p). Of the five factors to consider in determining whether the requested accommodation causes undue hardship for the employer, the first three deal with cost and the last two with the non-financial impact on the employer. *See supra* note 41 and accompanying text. *See generally* Southeastern Community College v. Davis, 442 U.S. 397, 410, 412 (1979).

[45] *Prewitt*, 662 F.2d at 308.

[46] 716 F.2d 227 (3d Cir. 1983).

[47] *Id.* at 228.

[48] *Id.* at 228-29.

[49] *Id.* at 230.

The Department asserted that because Strathie wore a hearing aid he would jeopardize the essential purpose of the program,[51] which was to ensure the "highest level of safety" for school bus passengers.[52] The Department argued that no reasonable accommodation would enable Strathie to meet the essential functions of the job.

The Department advanced four reasons why an accommodation of hearing aid wearers would be inconsistent with the program's purpose. Strathie offered viable alternatives in response to each of the Department's objections.[53] First, the Department objected that hearing aids could be dislodged while driving, making Strathie unable to provide for the safety and control of his passengers.[54] Strathie suggested that the Department require hearing-impaired drivers to wear hearing aids that attach to eye glasses. He presented evidence that this type of hearing aid was less likely to become dislodged than regular eyeglasses.[55] This was especially important because the Department regularly issued licenses to individuals who wore eyeglasses,[56] while refusing to license those with hearing aids.

Strathie countered the Department's second argument, "that a hearing aid . . . is subject to mechanical failure,"[57] by suggesting the Department require periodic inspection of hearing aids.[58] Strathie further suggested that the Department could "require hearing aid wearers to carry a spare aid and extra batteries,"[59] arguing that "neither the process of replacing the aid or its batteries, nor the time spent in so doing would jeopardize the driver's ability to provide for the control over and safety of his passengers to an appreciable extent."[60]

Strathie also countered the third and fourth objections of the Department: in response to an argument that the hearing aid wearer could turn the volume down or off, Strathie suggested that the Department require hearing impaired bus drivers to wear only aids with preset volume controls;[61] the contention that hearing aid wearers could not localize sound was met with Strathie's proposal that the Department require any hearing aid wearer to use a stereo hearing aid which, for some hearing impaired individuals, cured the problem of sound localization.[62] On the issue of stereo hearing aids, Strathie countered an additional argument that this type of aid only worked for some individuals by suggesting that the Department require "mandatory audiological testing [to] reveal which stereo hearing aid wearers would be able to localize sound sufficiently well, and which would not."[63] The case was remanded to the district court to determine whether "a wearer of a stereo hearing aid would present an appreciable risk to the safety and control of school bus passengers."[64]

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[50] This is a threshold analysis in Rehabilitation Act cases, and requires an individualized inquiry on a case-by-case basis. School Bd. v. Arline, 480 U.S. 274, 287 (1987).

[51] *Strathie*, 716 F.2d at 231.

[52] *Id.* at 232.

[53] *Id.* at 232-33.

[54] *Id.* at 232.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 233.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

Strathie demonstrates some of the hurdles a plaintiff may have to overcome in order to meet the burden of showing that reasonable accommodation is possible. However, an employee who resigns in the face of unfulfilled requests for accommodation has a greater burden–proving that his resignation was not voluntary and that he was, in fact, constructively discharged. A disabled employee who feels an employer has failed to provide reasonable accommodation is forced to choose: either continue in the job without accommodation and pursue the remedies available under the Act, or resign and attempt to prove that the employer's failure to provide reasonable accommodation resulted in the employee's constructive discharge.

II. CONSTRUCTIVE DISCHARGE

The courts developed the doctrine of constructive discharge in employment discrimination by analogy to cases arising under the National Labor Relations Act (NLRA).[65] In *J. P. Stevens & Co. v. NLRB*,[66] Beck, a production worker, was paid a set amount for each item produced. Her employer reduced her production pay rate without giving her advance notice.[67] At the new piece rate she needed to substantially increase her daily production to reach the (then) minimum wage rate of $1.60 per hour.[68] Her employer took this action after learning that Beck supported the union's organizational campaign.[69] Beck finally quit after management refused to "work something out" to restore her pay to its former level.[70] The court ordered Beck's reinstatement, saying that "an employer [who] deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job because of union activities or union membership . . . has constructively discharged the employee in violation of section 8(a)(3) of the Act."[71]

The constructive discharge doctrine eventually made its way into Title VII cases,[72] and other federal anti-discrimination cases as well.[73] Because employees who quit are presumed to do so voluntarily,[74] the plaintiff claiming constructive discharge must meet several requirements, which may vary depending upon the circuit.

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[63] *Id.* at 234.

[64] *Id.*

[65] 29 U.S.C. §§ 151-169.

[66] 461 F.2d 490 (4th Cir. 1972).

[67] *Id.* at 494.

[68] *Id.* at 494 n.2. Beck's previous production rate had enabled her to make $1.91 per hour.

[69] *Id.* at 494.

[70] *Id.*

[71] *Id.* (citing NLRB v. Cavalier Olds, Inc., 421 F.2d 1234 (6th Cir. 1970)); Retail Store Employees Union Local 880 v. NLRB, 419 F.2d 329 (D.C. Cir. 1969); NLRB v. Holly Bra of California, Inc., 405 F.2d 870 (9th Cir. 1969)).

A. *Requirements for a Finding of Constructive Discharge*

"Whether an employer's treatment of an employee constitutes a constructive discharge is a finding of fact."[75] The two main requirements for a finding of constructive discharge are: (1) the employee was subjected to discriminatory employment practices, and (2) these practices made the working conditions so intolerable the employee was forced to quit.[76] Some circuits also require that the employer intend to force the employee to quit.[77] This "specific intent" requirement reflects the development of the constructive discharge doctrine under the NLRA.[78] The National Labor Relations Board ("NLRB") imposes a requirement that the employer act in furtherance of a desire to force the employee to quit.[79] Early constructive discharge cases under Title VII applied this same strict standard.[80]

The Fourth and Eighth Circuits continue to adhere to the intent requirement. The Fourth Circuit requires a plaintiff to show both intolerable working conditions and a deliberate effort by the employer to force the employee to quit.[81] The Eighth Circuit states that "the employer's actions must have been taken with the intention of forcing the employee to quit."[82] However, the majority of circuits do not require specific intent on the part of the employer, and find constructive discharge where the working conditions are so intolerable that "a reasonable person in the employee's shoes would resign."[83] Under either the "intent" standard or the "reasonable person" standard, the plaintiff must prove the discriminatory actions of the employer made the work environment intolerable.

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[72] *See, e.g.*, Derr v. Gulf Oil Corp., 796 F.2d 340 (10th Cir. 1986); Goss v. Exxon Office Sys. Co., 747 F.2d 885 (3d Cir. 1984); EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983); Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981); Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981); Young v. Southwestern Savings & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975).

[73] *See, e.g.*, Pena v. Brattleboro Retreat, 702 F.2d 322 (2d Cir. 1983); Jacobson v. American Home Prod. Corp., 36 Fair Empl. Prac. Cas. 559 (BNA) (N.D. Ill. 1982) (cases under the ADEA). *See also* Kent v. Derwinski, 790 F. Supp. 1032 (E.D. Wash. 1991); Johnson v. Sullivan, 764 F. Supp. 1053 (D. Md. 1991), *rev'd sub nom.* Johnson v. Shalala, 991 F.2d 126 (4th Cir. 1993) (cases of constructive discharge under the Rehabilitation Act).

[74] Durden v. Department of the Navy, 18 M.S.P.R. 373 (1983) (citing Christie v. United States, 518 F.2d 584, 587 (Ct. Cl. 1975)).

[75] Jacobson v. American Home Prod. Corp., 36 Fair Empl. Prac. Cas. (BNA) 559 (N.D. Ill. 1982).

[76] EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 672 (4th Cir. 1983).

[77] *Id.* (citing Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir. 1982)). The Tenth Circuit no longer requires the plaintiff to demonstrate that the employer intended to force the employee to resign. *See* Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986).

[78] *See supra* notes 65-71.

[79] *See, e.g.*, Crystal Princeton Ref. Co., 222 NLRB Dec. (CCH) 1068, 1069 (1976) (alleged violation of sections 8(a)(1) and (3) of the National Labor Relations Act due to the employer's efforts to "chill any further union activity").

[80] *See, e.g.*, Muller v. United States Steel Corp., 509 F.2d 923, 929 (10th Cir. 1975); Young v. Southwestern Savings & Loan Ass'n, 509 F.2d 140, 143-44 (5th Cir. 1975) (generally, an employer must deliberately make working conditions intolerable in order to involve constructive discharge) *but see* Landgraf v. USI Film Prod., 968 F.2d 427, 429 (5th Cir. 1992); Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572, 580 (10th Cir. 1990) (test is whether reasonable person in employee's shoes would feel forced to resign).

[81] Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985).

[82] Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981).

A determination that working conditions are intolerable is made using a totality of the circumstances approach,[84] and a finding of discrimination alone will not always negate a finding that the employee quit voluntarily.[85] A constructive discharge "must be justified by the 'existence of certain aggravating factors.'"[86] Aggravating factors can include a history of discriminatory acts or an atmosphere of hostility toward an employee that causes a loss of confidence or humiliates the employee.[87] "A pattern of discriminatory behavior, as opposed to an isolated act, may [also] be an aggravating factor permitting the inference of a constructive discharge."[88]

The presence of prohibited discrimination alone will not necessarily support a finding of constructive discharge. In *Bourque v. Powell Elec. Mfg. Co.*,[89] the Fifth Circuit held that the employer's failure to provide equal pay for equal work violated Title VII.[90] However, the discrimination itself was insufficient to find constructive discharge. "[S]ociety and the policies underlying Title VII [are] best served if . . . unlawful discrimination is attacked within the context of existing employment relationships."[91] Under the *Bourque* philosophy, an employee must mitigate damages by remaining on the job unless that job presents "such an aggravated situation that a reasonable employee would be forced to resign."[92] Even though Ms. Bourque suffered from discrimination, the court did not believe that working for unequal pay was so intolerable that it forced her to resign.[93] Unequal pay is not, by itself, an aggravating factor; therefore, the court concluded that a finding of constructive discharge could not be sustained.[94] The discrimination suffered must be particularly severe to support constructive discharge;[95] "neither the failure to promote, the payment of unequal wages, nor an unlawful transfer, by itself, provides the factual basis for a finding of constructive discharge."[96]

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[83] Goss v. Exxon Office Sys. Co., 747 F.2d 885, 888 (3d Cir. 1984); *see also Derr*, 796 F.2d at 344; Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983); Nolan v. Cleland, 686 F.2d 806, 812-15 (9th Cir. 1982); Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982); Clark v. Marsh, 665 F.2d 1168, 1174-76 (D.C. Cir. 1981); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, (5th Cir. 1980); Rosado v. Santiago, 562 F.2d 114, 119 (1st Cir. 1977).

[84] Kent v. Derwinski, 790 F. Supp. 1032, 1040 (E.D. Wash. 1991).

[85] Durden v. Department of the Navy, 18 M.S.P.R. 373, 376 n.2 (1983).

[86] Cockrell v. Boise Cascade Corp., 781 F.2d 173, 177 (10th Cir. 1986) (quoting Irving v. Dubuque Packing Co., 689 F.2d 170, 173 (10th Cir. 1982)).

[87] Harris v. First Nat'l Bank, 680 F. Supp. 1489, 1493 (D. Kan. 1987).

[88] *Id.*

[89] 617 F.2d 61 (5th Cir. 1980).

[90] *Id.*

[91] *Id.* at 66.

[92] *Id.*

[93] *Id.* at 65. "The very fact that Ms. Borque accepted the position under the conditions imposed belies such a contention." *Id.*

[94] *Id.*

[95] Sparrow v. Piedmont Health Sys. Agency, Inc., 593 F. Supp. 1107, 1117 (M.D.N.C. 1984).

Although an employee who resigns after being passed over for promotion would not ordinarily succeed on a claim of constructive discharge, aggravating factors may be found in the circumstances surrounding the failure to promote. In *Clark v. Marsh*,[97] the plaintiff served in the Army for over twenty-five years. Prior to her retirement, Clark served three years as Deputy Director of the Office of Employment Policy and Grievance Review, and over one year as Acting Director.[98] Her performance ratings as Acting Director were either outstanding or satisfactory.[99] Despite her substantial supervisory experience and performance ratings, Clark did not receive the permanent Director's position. Holly Hemphill, "a recent law school graduate with no supervisory experience," was appointed instead. Four days after Hemphill's appointment Clark resigned.[100]

Clark sued, alleging that defendants had unlawfully deprived her of opportunities for training, promotions, and transfers on the basis of her sex.[101] On appeal, the court held that the continuing pattern of discrimination over a period of years satisfied the "aggravating factors" requirement of *Bourque*.[102] This "historic discrimination" against the plaintiff explains the sex discrimination holding in spite of the appointment of a female to the position Marsh sought.

The *Clark* court considered not only the actions of the employer, but also plaintiff's efforts to achieve her goals, her expectations, and the frustration she experienced as a result of being denied the promotion.[103] In constructive discharge, the focus is on whether a *reasonable employee* would find the working conditions intolerable. The *Clark* court's consideration of the effect the employer's action (in this case, inaction) had on Clark indicates that the severity of the effect will be a factor in determining whether a reasonable person would find the working conditions so intolerable they would be forced to resign.

Clark and similar cases[104] indicate that an employee alleging constructive discharge under the ADA must prove more than the employer's failure to provide accommodation. The plaintiff may be able to argue, however, that *the results* of the failure to accommodate constituted aggravating factors that made the work environment intolerable.

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[96] *Id.*

[97] 665 F.2d 1168 (D.C. Cir. 1981).

[98] *Id.* at 1174.

[99] *Id.* at 1175.

[100] *Id.* at 1170.

[101] *Id.* In addition to Clark's claim of past gender discrimination, in the prior district court action she charged unlawful retaliatory action following her grievance filings. Clark v. Marsh, 489 F. Supp. 1236 (D.C. 1980), *aff'd*, 665 F.2d 1168 (D.C. Cir. 1981).

[102] *Id.* at 1174-76. In spite of an outstanding employment record, Marsh had been denied promotions for which she was qualified, as well as lateral transfers and increased educational training. *Id.*

[103] *Id.* at 1175.

[104] EEOC v. Federal Reserve Bank, 698 F.2d 633 (4th Cir. 1983) (plaintiff failed to show that the employer's reason for promoting another was pretextual); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61 (5th Cir. 1980) (unequal pay is not a sufficient aggravating factor to substantiate a claim of constructive discharge); Durden v. Department of the Navy, 18 M.S.P.R. 373 (1983) (a plaintiff must overcome a presumption that a retirement decision is voluntary).

B. *Constructive Discharge of Disabled Employees*

If an employer fails to accommodate a disabled employee[105] who subsequently resigns, the plaintiff alleging constructive discharge must meet the same prima facie requirements as for any other violation under the ADA. A plaintiff must establish that he: (1) is a disabled person within the meaning of the statute; (2) is a qualified individual with a disability; and (3) was terminated because of his disability.[106]

Once an individual establishes that he is disabled within the meaning of the statute,[107] the second element requires a showing that the requested accommodation is reasonable, and that the employee can perform the essential functions of the job with accommodation.[108] Failure to make reasonable accommodation, while technically a violation of the ADA,[109] will not of itself meet the third requirement–that the failure to accommodate resulted in the termination of the employee.[110] There are few cases under the Rehabilitation Act where constructive discharge due to a failure to provide accommodation was alleged.[111] However, plaintiffs under the Rehabilitation Act (and under the ADA) need to establish the same basic elements in order to sustain a finding of constructive discharge.

In *Johnson v. Shalala*, the Fourth Circuit reiterated its requirement that plaintiffs "show both intolerable working conditions *and* a deliberate effort by the employer to force the employee to quit."[112] Johnson suffered from a number of medical ailments, the most troublesome of which was "idiopathic CNS hypersomnolence, a form of narcolepsy or excessive sleepiness that required her to sleep nine or more hours per night and to take short naps during the day."[113] Johnson also had cardiac arrhythmia, which precluded her from taking medication to control the narcolepsy.[114] These medical problems were further complicated by the fact that she had a commuting time of approximately one hour, necessitating that she pull over for fifteen-minute naps, making it difficult for her to arrive at work at a fixed time."[115]

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[105] The first requirement of a prima facie case is that the individual have a disability.

[106] Kent v. Derwinski, 790 F. Supp. 1032, 1038-39 (E.D. Wash. 1991).

[107] A disability is: (A) a physical or mental impairment that substantially limits one or more of the major life activities; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C. § 12102(1).

[108] *See supra* notes 17-23 and accompanying text.

[109] *See supra* note 15.

[110] It will, however, meet the first requirement for a finding of constructive discharge–that there was discriminatory action on the part of the employer. *See supra* notes 75-76 and accompanying text.

[111] *See* Johnson v. Sullivan, 764 F. Supp. 1032 (D. Md. 1991), *rev'd sub nom.* Johnson v. Shalala, 991 F.2d 126 (4th Cir. 1993) (petition for certiorari filed August 16, 1993); Kent v. Derwinski, 764 F. Supp. 1053 (E.D. Wash. 1991).

[112] *Johnson*, 991 F.2d at 131 (emphasis added).

[113] *Id.* at 128.

[114] *Id.*

Johnson's employer implemented several accommodations at her request, but the district court found that the employer "had not reasonably accommodated Johnson's handicap and had constructively discharged her by failing to act in the face of known intolerable conditions."[116] On appeal, the employer challenged only the district court's finding that the employer acted with "deliberateness."[117] Although the court stated that "[d]eliberateness can be demonstrated by . . . circumstantial evidence,"[118] it found insufficient evidence to show "a deliberate intent to discharge an employee when there [had] been an attempt to accommodate" the employee, even if the accommodation did not satisfy the requirements of the Rehabilitation Act.[119] Although her employer "could have done more, and should have done more" to provide accommodation under the Rehabilitation Act, the court held that the evidence was insufficient to support a finding of a "deliberate intent to force Johnson from her job."[120]

In *Kent v. Derwinski*,[121] another Rehabilitation Act case, the court decided the issue of constructive discharge by employing the reasonable person standard applied by the majority of circuits in Title VII cases:[122] "whether, judging from the totality of the circumstances, a reasonable person in the employee's position would feel that she was 'forced to quit because of intolerable and discriminatory working conditions.'"[123] The Veterans Administration Medical Center ("VAMC") hired Ms. Kent, a mentally retarded and emotionally disabled person, to work in the VMAC's laundry.[124] From the beginning, Ms. Kent was taunted by co-workers who called her "brain dead," "droolie," and remarked that she looked like she had been "sniffing glue."[125] In spite of the taunts, Ms. Kent was able to consistently improve her job performance, receiving "fully satisfactory" evaluations.[126] Ms. Kent's success was due largely to the quality of supervision she received from Joe Smith.[127] Smith quietly explained to Kent what she needed to do, and reprimanded any worker who taunted her.[128]

Smith left VAMC, and Kent became unable to successfully perform the functions of her job. The court found that Kent's new supervisor, Susan Randall, subjected her to inappropriate disciplinary measures, and failed to prevent the taunting by her co-workers.[129] VAMC management tried to accommodate Ms. Kent's disability by training and counseling Ms. Randall in appropriate methods of supervision and discipline.[130] Management also required co-workers to attend two sensitivity training sessions, and counselors from Goodwill Industries assisted VAMC and Ms. Kent.[131]

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[115] *Id.*
[116] *Id.* at 130.
[117] *Id.* at 131.
[118] *Id.*
[119] *Id.* at 132.
[120] *Id.*
[121] *Kent*, 790 F. Supp. 1032 (E.D. Wash. 1991)
[122] *See supra* note 83 and accompanying text.
[123] 790 F. Supp. at 1040 (quoting Watson v. Nationwide Ins. Co., 823 F.2d 360, 361 (9th Cir. 1987)).
[124] *Id.* at 1035.
[125] *Id.* at 1036.
[126] *Id.*
[127] *Id.* at 1035-36. Smith had over 22 years experience as a supervisor. *Id.*
[128] *Id.* at 1036.

VAMC contended that it accommodated Kent's handicap through use of a "soft approach" to discipline, and supervision which avoided direct criticism or undue stress on Ms. Kent.[132] The court found, however, that:

> even though efforts were made to accommodate Ms. Kent's handicap by training, counselling and discussion, no real change took place. Ms. Randall continued to make numerous critical remarks to Ms. Kent about her work productivity . . . and to single her out for discipline if any dispute arose involving her. Co-workers continued the taunting and name calling.[133]

Ms. Kent was hospitalized twice for breakdowns while employed with VAMC; once within weeks after Randall became supervisor, and again after a flare-up with co-workers.[134]

Ms. Kent attempted to remedy her work situation (and obtain reasonable accommodation) by complaining to her union representative and VAMC management, and by talking with both her mental health counselor and a vocational counselor from Goodwill Industries.[135] Ms. Kent also tried to please Ms. Randall, and talked with her directly about her situation.[136] However, no significant change in her working environment resulted,[137] and after slightly more than three years on the job, Ms. Kent resigned.[138]

There was "every indication that if VAMC had effectively followed through on the accommodation methods that it began under Mr. Smith, Ms. Kent would have been able to continue as a productive employee at VAMC."[139] Although VAMC management made a good faith effort to keep her from quitting, those efforts were "too little, too late."[140] There was no indication the work environ-

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129. Randall would lecture Kent for up to two hours on getting along with co-workers, order her to stand against a wall and not work, grab her arm and order her to keep quiet about conditions in the laundry, and criticize her for her behavior, which was due to her disability. *Id.* at 1037.

130. *Id.*

131. *Id.*

132. *Id.* at 1040.

133. *Id.*

134. *Id.* at 1038.

135. *Id.* at 1041.

136. *Id.*

137. *Id.*

138. *Id.* at 1038.

139. *Id.* at 1040.

140. *Id.* at 1041.

ment would change, and it was so overwhelming that "a reasonable person . . . would have found Ms. Kent's work situation intolerable and discriminatory because of her handicap and would have felt forced to quit."[141] "Ms. Kent was constructively discharged from her job because of her handicap."[142] The totality of the circumstances satisfied the third element of a prima facie case–she was discharged due to her handicap.

In *Kent*, the employer's good faith efforts at accommodation were insufficient, and the failure to provide reasonable accommodation created intolerable working conditions which resulted in a constructive discharge. Although the court did not specifically address any aggravating factors, it seems clear that the effect of non-accommodation on Ms. Kent (her two hospitalizations for breakdowns) satisfied this requirement.

The Fourth and Eighth Circuits continue to require the employee to show that the employer intended to force the employee to resign, in order to find that the employee was constructively discharged. However, the Eighth Circuit has recently stated that this requirement "does not mean constructive discharge plaintiffs must prove their employers *consciously* meant to force them to quit."[143] Instead, the Eighth Circuit has determined that the intent requirement is met if the employee's resignation is "a reasonably foreseeable consequence" of the employer's discriminatory actions.[144] A finding that a reasonable person in the employee's position would feel compelled to quit is equivalent to finding that the employee's resignation was a foreseeable consequence of the employer's conduct.[145] If the failure to provide accommodation creates an intolerable work environment that is sufficiently egregious, the court may find the employer intended to force the employee to quit, simply because no other reasonable inference can be drawn.

In *Johnson*,[146] if the employer had not provided some accommodation of Johnson's disability, the court could have sustained the district court's finding that Johnson was constructively discharged on the basis that the employer could have reasonably foreseen the consequences of its actions.[147] Even if an employer attempts to provide accommodation, as in *Johnson* and *Kent*,[148] the presence of "aggravating factors" that create a hostile, intolerable working environment may still result in a finding of constructive discharge. Regardless of which standard is applied, there are unanswered questions regarding the scope of an employer's duty to provide reasonable accommodation.

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[141] *Id.*

[142] *Id.*

[143] Hukkanen v. International Union of Operating Eng'rs, Nos. 92-2042WM, 92-1962WM, 1993 WL 317088, at *2 (8th Cir. Aug. 24, 1993) (emphasis added).

[144] *Id.*

[145] *Id.*

[146] *See supra* notes 111-20 and accompanying text.

[147] 991 F.2d 126 (4th Cir. 1993), *petition for cert. filed* 62 U.S.L.W. 3149 (U.S. Aug. 16, 1993) (No. 93-248). "[A] complete failure to accommodate, in the face of repeated requests, might suffice as evidence to show the deliberateness necessary for constructive discharge." *Id.* at 132.

[148] *See supra* notes 121-42 and accompanying text.

III. UNANSWERED QUESTIONS: WHEN DOES REASONABLE ACCOMMODATION NECESSITATE THE TRANSFER OF A DISABLED EMPLOYEE?

Constructive discharge may be found where an employee quits due to the employer's failure to provide reasonable accommodation, if that failure creates intolerable working conditions.[149] Questions arise, however, regarding the employer's duty of reasonable accommodation–questions not addressed in the ADA or its legislative history. While job restructuring, modified work schedules, and similar provisions are listed as reasonable accommodations under the Rehabilitation Act,[150] only the ADA specifically requires the employer to consider reassigning the disabled employee to a vacant position.[151] The term "vacancy" is not defined; the legislative history does make clear, however, that the employer is not required to transfer or fire another employee to create a vacancy for a disabled employee.[152]

A. *Must an Employer Consider Transferring a Disabled Employee to a Vacant Position If It Did Not Intend to Fill the Position Due to Economic Constraints or Other Business Factors?*

Charges of disparate treatment under the ADA are subject to the same defenses as under Title VII, and an employer may successfully defend a charge of disparate treatment if it can show it has a legitimate, nondiscriminatory reason for its action.[153] An employer's plan to eliminate a vacant position due to economic constraints is likely a legitimate business reason, and would excuse the employer's failure to transfer a disabled individual to that position. However, the plaintiff may still prevail if he or she shows the employer's proffered reason is merely pretext–that the employer's reason is a sham to cover a desire to be rid of the disabled employee.[154] The courts' traditional deference to the business judgment of employers may make it difficult for the plaintiff to establish that the employer's motives are actually pretextual.

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[149] *See supra* Part II.

[150] 29 C.F.R. § 1613.704(b) (1993); *see also* Overton v. Reilly, 977 F.2d 1190, 1193-94 (7th Cir. 1992).

[151] S. REP. NO. 116, 101st Cong., 2d Sess. at 31 (1989).

[152] *Id.* at 32.

[153] 29 C.F.R. § 1630.15(a). This standard originated in cases under Title VII. *See, e.g.*, Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981).

[154] 29 C.F.R. app. § 1630.15(a). The burden of showing pretext is on the employee. *See Womack*, 619 F.2d at 1296.

B. *Must an Employer Consider Transferring an Employee Who Cannot Perform the Essential Functions of Her Current Job Despite Reasonable Accommodation?*

Under the ADA, the employer in *Kent*[155] would have been required to consider transferring her to another position. If Kent's employer had provided the accommodations the court found lacking, and she was still unable to perform the functions of her job, would Kent be entitled to a reassignment to a vacant position? While there is no duty on the part of the employer to transfer a disabled individual who, despite accommodation, is performing unsatisfactorily in a current position,[156] does the inclusion of job transfer as a method of accommodation mean that the employer must consider transferring an unsatisfactory employee?

This question is difficult to answer, but future court decisions may turn on whether the employee has a disability when hired, or becomes disabled *while employed*. Technically, a disabled employee hired for a specific position who fails to attain satisfactory job performance despite reasonable accommodation does not meet the definition of a qualified individual.[157] In that situation, it is logical to assume that the employer's duty to provide accommodation ends.

However, if a current employee becomes disabled, and there are no accommodations which would enable the employee to remain in the current position, the employer should be required to honor the disabled employee's request to transfer to a vacant position. An employee who suddenly becomes unable to perform his or her job due to an unforeseen, disabling accident or illness is entitled to the same protection as the job applicant. Reassignment to a vacant position as a means of accommodation is geared toward the protection of disabled individuals who are already employed-an applicant must meet the essential functions of the job before being hired. Placing a duty on the employer to consider transferring an existing employee who has suffered a disabling impairment meets the goals of the ADA.

C. *Does the Duty to Provide Reasonable Accommodation Include Transferring an Offending Employee Who Discriminates Against a Disabled Individual?*

The *Kent* case raises an additional question of whether or not, under the ADA, the VAMC would be required to consider transferring Ms. Kent's supervisor to a vacant position. The ADA does not address whether the transfer of an offending supervisor or other employee to a vacant position is a means of accommodation. Drawing an analogy to Title VII "hostile environment" sexual harassment cases,[158] an employer in the same position as the VAMC should be required to consider transferring a supervisor like Ms. Randall, who continued to treat Ms. Kent harshly in spite of management's efforts to provide reasonable accommodation. Also, the employer's duty to provide "modifications or adjustments to the work environment"[159] could conceivably include the transfer of an offending supervisor such as Ms. Randall.

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[155] *See supra* notes 121-42 and accompanying text.

[156] Failure to perform the essential functions of a job renders an individual not qualified. *See supra* notes 17-22 and accompanying text.

[157] *Id.*

At present, there are no definitive answers to the above questions, and the answers given are merely suggestions. It is up to the courts to decide how far an employer's duty of accommodation extends. The courts will also have to determine, on a case by case basis, whether a failure to provide reasonable accommodation constitutes constructive discharge where a disabled employee resigns, and later claims that the failure to accommodate made the work environment intolerable.

IV. CONCLUSION

The constructive discharge doctrine does not fit neatly within the Rehabilitation Act or the ADA due to the additional requirement, not found in Title VII or other federal legislation, that the employer accommodate a disabled employee. An employer's failure to provide requested accommodation can and does result in a work environment that burdens an already challenged individual's efforts to maintain satisfactory employment. Where working conditions become so intolerable that the employee resigns rather than tolerate the day-to-day physical and mental difficulties associated with efforts to work in an inhospitable environment, the constructive discharge doctrine may afford relief.

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[158] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).
[159] *See supra* note 26 and accompanying text.

COMMENTARY

STUDENTS, STAFF AND FACULTY WITH DISABILITIES: CURRENT ISSUES FOR COLLEGES AND UNIVERSITIES

Laura F. Rothstein*

Five years ago, The Journal of College and University Law published my article entitled *Section 504 of the Rehabilitation Act: Emerging Issues for Colleges and Universities*,[1] in which I noted the increasing numbers of handicapped students, staff and faculty on college campuses. With the increased numbers and the growing awareness of legal rights, I suggested the importance of establishing sound practices in addressing issues related to this population. Five years later, it is more important than ever that the university attorney be aware of the trends and issues in this area, for three major reasons.

First, the number of individuals with disabilities on campus continues to increase. While completely accurate data remains difficult to obtain, we have some idea of the numbers of students with disabilities on campus. As of the fall of 1986, approximately 10.5 percent of the nation's 12.5 million post-secondary students were reported to have some disability. A breakdown by disability category indicates that 1.3 percent of students have a learning disability, 4.1 are visually handicapped, 2.1 percent are hard of hearing, .6 percent are deaf, .5 percent have a speech disability, 1.8 percent have an orthopedic handicap, and 2.6 percent are health impaired.[2]

Second, there has been an increased awareness of the legal rights of handicapped individuals. Many of the students now entering college, professional and graduate schools went through public education identified as having handicapping conditions and, as a result, received services and accommodations under the Education for All Handicapped Children Act.[3] The expectations of these individuals exceed those of disabled students a generation ago. They benefit not only from greater substantive protections, but also from greater procedural safeguards to protect their rights.

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[1] Rothstein, *Section 504 of the Rehabilitation Act: Emerging Issues for Colleges and Universities*, 13 J.C.U.L. 229 (1986).

[2] *See* Appendix A, *Profile of Handicapped Students in Postsecondary Education*, 1987, Survey Report by the National Center for Education Statistics, U.S. Department of Education CS 89-337 (June 1989).

[3] 20 U.S.C. § 1401-1461 (1988).

Third, this growing awareness has led to an increase in the amount of litigation relating to these issues. In the past two to three years, a number of complaints have been filed.[4] While many of them have been settled, the number of complaints clearly indicates that individuals with disabilities no longer remain passive if they believe their legal rights have been violated. Such litigation is expensive, both in terms of financial resources and in loss of reputation of the institution involved.

CURRENT LITIGATION TRENDS

Section 504 of the Rehabilitation Act of 1973[5] provides the primary legal basis for recent litigation relating to college students and faculty with disabilities. That statute prohibits recipients of federal financial assistance from discriminating against otherwise qualified handicapped individuals. Since most colleges and universities receive federal financial assistance, they are subject to the dictates of the Rehabilitation Act. In addition, the Civil Rights Restoration Act of 1987[6] subjects an entire university to Section 504 if any unit within the university receives federal financial assistance. Other legal bases for litigation include the fourteenth amendment of the Constitution, the Fair Housing Act,[7] and state anti-discrimination statutes.[8] The passage of the Americans with Disabilities Act[9] in 1990 will in all likelihood increase the amount of litigation in this area.

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[4] See United States v. Board of Trustees for Univ. of Ala., 908 F.2d 740 (11th Cir. 1990) (involving policy of charging for auxiliary services on an ability-to-pay basis); Brown v. Washington Univ., CA No. 88-1907-C-5 (settled May 11, 1990) (university agreed to spend $2.5 million over two years to provide architectural modifications on campus); The Ability Center of Greater Toledo v. University of Toledo, CA No. 3:89CV7561 (settled November, 1989, N.D. Ohio) (university agreed to install platform lifts in apartment complex used for fraternity and sorority housing); Prince v. Rutgers Univ. Law School (not reported) (the suit filed in 1989 by a deaf law student resulted in a temporary restraining order to obtain records of lectures and transcripts of classes through the end of the semester); Dinsmore v. University of Cal., (not reported) (student with dyslexia sued university claiming that math professor's refusal to allow him extra time for a math test violated the Rehabilitation Act); Wynne v. Tufts Univ. School of Medicine, 58 U.S.L.W. 2658 (1st Cir. 1990) (First Circuit remanded case to district court for further findings in a case involving dismissal of dyslexic medical school student who claimed that the refusal to modify the multiple-choice exam format violates the Rehabilitation Act); McGuire v. Switzer, 734 F. Supp. 99 (S.D.N.Y. 1990) (paraplegic former law student challenged New York state vocational-rehabilitation policy that placed a ceiling on funding for tuition and maintenance expenses in connection with legal education).

[5] 29 U.S.C. § 794 (1988).

[6] 29 U.S.C. § 794(a)(2)(A) (1988).

[7] 42 U.S.C. §§ 3601-3619 (1988). This law prohibits discrimination in housing on the basis of handicap and requires some structural access in implementation.

[8] See L. ROTHSTEIN, RIGHTS OF PHYSICALLY HANDICAPPED PERSONS, § 4.20 (1984 and cumulative supplements) for state employment-discrimination issues.

[9] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990).

The recent decisions and current litigation offer an array of diverse, complex, and interesting issues. These include such issues as whether an individual professor can claim academic freedom in refusing to allow additional time for a learning-disabled student to take an examination,[10] whether a university can construct apartment units without elevators,[11] what level of support is required for a deaf law student,[12] whether a medical school professor must provide an examination in a different format because a learning disabled student cannot succeed on multiple-choice examinations,[13] and whether chronic tardiness qualifies as a handicap.[14]

Despite all the pending litigation, several recent settlements, and reported cases that relate to disability issues in the university setting, only two Supreme Court cases have addressed these issues.[15] The 1979 Supreme Court decision of *Southeastern Community College v. Davis*[16] held that a hearing-impaired nursing student was not "otherwise qualified" to perform the essential aspects of the nursing program, even with reasonable accommodation for her handicap, because of safety factors.[17] This case set the standard for determining when a handicapped student is "otherwise qualified" to perform the essential aspects of an educational program. The Court held that a handicapped student must meet the fundamental requirements of the educational program in spite of such student's handicap.[18]

The only other Supreme Court case dealing with a disability issue in higher education provided little help because the Court, after briefs and oral arguments, avoided deciding the substantive issue and held the case moot because it came before the Court on a preliminary injunction rather than a final disposition. A substantive decision in *University of*

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[10] Dinsmore v. University of Cal., (not reported, litigation pending).

[11] Ability Center of Greater Toledo v. University of Toledo, CA No. 3:89CV7561 (settled November 1989, N.D. Ohio).

[12] Prince v. Rutgers Univ. Law School (not reported).

[13] Wynne v. Tufts Univ. School of Medicine, 58 U.S.L.W. 2658 (1st Cir. 1990).

[14] School Dist. of Philadelphia v. Friedman, 96 Pa. Commw. 287, 507 A.2d 822 (1986) (decided under Pennsylvania state law).

[15] The case of County of Los Angeles v. Kling, 474 U.S. 936, 106 S. Ct. 300 (1985) provided no significant precedential value because of the unusual circumstances of the decision. The Court simultaneously granted certiorari and reversed the Ninth Circuit without oral argument. The Court held that a nursing-school applicant with Crohn's disease did not state a Rehabilitation Act claim of discrimination. *See also*, Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 106 S. Ct. 748 (1986) (no first-amendment violation to provide vocational-rehabilitation aid to a blind student who wanted to finance religious training at a Christian college).

[16] 442 U.S. 397, 99 S. Ct. 2361 (1979).

[17] The nursing program at issue required nursing students to understand speech without reliance on lipreading, and the Court found that this requirement related to patient safety. *Id.* at 407, 99 S. Ct. at 2367. The Court also found that the ability to understand speech was indispensable for many other functions that a registered nurse must perform. *Id.*

[18] *Id.* at 406, 99 S. Ct. at 2367.

Texas v. Camenisch[19] would have provided important guidance concerning the financial responsibility of colleges and universities in providing auxiliary services and other accommodations such as interpreters, readers, and tutors to handicapped students. The case involved a deaf graduate student who wanted the university to pay a sign-language interpreter. The case raised an important issue for handicapped graduate students, many of whom are not eligible for state vocational-rehabilitation funding.

Pending litigation against the University of Alabama might help answer the questions left unresolved in *Camenisch*. This litigation involves the University's policy of charging handicapped students, on an ability-to-pay basis, for auxiliary services provided to them. The Eleventh Circuit found the system in violation of Section 504.[20]

Because of the paucity of Supreme Court guidance, one can only speculate about the resolution of a number of these major issues. What follows is an overview of what I view as the current status of these major issues.

Eligibility for Section 504 Coverage

The courts have interpreted handicap eligibility under Section 504 very broadly. A similar interpretation is likely under the Americans with Disabilities Act.[21] Section 504 protects not only those with current qualifying disabilities, but also those with a record of such disabilities or those who are regarded as having such disabilities. Thus far the statute has been interpreted to include individuals with AIDS,[22] those who are hypersensitive to smoke,[23] a transvestite,[24] an individual with a heart condition,[25] an alcoholic student,[26] individuals with learning disabilities,[27] a kleptomaniac,[28] individuals with epilepsy[29] and diabetes,[30] compulsive gamblers,[31] and drug addicts.[32] While not all of these cases arose in the university context, they do give a sense of the broad definition of handicap under the Rehabilitation Act. Courts defining handicap under Section 504, however, have denied protection to individuals who were left-handed,[33] those with a fear of heights,[34] one with varicose veins,[35] one having occasional episodes of stress, depression or mental exhaustion,[36] an individual with crossed eyes,[37] one with post-traumatic-stress disorder,[38] and one who was chronically late.[39] These individuals did not qualify as handicapped under federal or state law.[40]

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[19] 451 U.S. 390, 101 S. Ct. 1830 (1981).

[20] See United States v. Board of Trustees for Univ. of Ala., 908 F.2d 740 (11th Cir. 1990).

[21] Pub. L. No. 101-336, 104 Stat. 327 (1990).

[22] Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988).

[23] Vickers v. Veterans Admin., 549 F. Supp. 85 (W.D. Wash. 1982).

[24] Blackwell v. United States Dept. of Treasury, 639 F. Supp. 289 (D.D.C. 1986).

[25] Commonwealth v. Brown, 125 Pa. Commw. 372, 558 A.2d 121 (1989).

[26] Anderson v. University of Wis., 841 F.2d 737 (7th Cir. 1988).

[27] Wynne v. Tufts Univ. School of Medicine, 58 U.S.L.W. 2658 (1st Cir. 1990).

[28] Fields v. Lyng, 705 F. Supp. 1134 (D. Md. 1988).

[29] Reynolds v. Brock, 815 F.2d 571 (9th Cir. 1987).

[30] Serrapica v. City of New York, 708 F. Supp. 64 (S.D.N.Y. 1989).

[31] Rezza v. Department of Justice, 46 Fair Empl. Prac. Cas. (BNA) 1366 (E.D. Pa. 1988).

[32] Nisperos v. Buck, 720 F. Supp. 1424 (N.D. Cal. 1989).

DETERMINING "OTHERWISE QUALIFIED"

Simply because a student or faculty member suffers from a legal handicap does not automatically entitle that person to relief from the college or university. The student or faculty member must also be "otherwise qualified" to perform the essential aspects of the program in spite of the handicapping condition. While colleges and universities need not fundamentally alter the nature of their programs, the law does require them to provide reasonable accommodations for handicapped students and faculty members.[41] Recently, a court held that a student with retinitis pigmentosa was not "otherwise qualified" for an optometry program because he could not complete the clinical requirements,[42] and another court has held that a student with deformed fingers was not "otherwise qualified" for a physical therapy program because he could not perform the manipulations required for graduation.[43] It should be noted that in health-related academic programs, such as medical and nursing schools, courts have been particularly deferential to institutional qualifications that relate to the safety of the student or others who may be harmed by the student.[44]

Determining whether a handicapped person is "otherwise qualified" to complete an academic program raises interesting legal points. What can be asked at the preadmission or prehiring stage? Who carries the obligation to indicate the existence of a disability that warrants special consideration both at the admissions/hiring stage and at the performance stage? What happens when a student or faculty member fails to perform at the required level, is suspended or terminated, and then claims that a disability caused the inadequate performance? Must the institution readmit/rehire the individual? If so, what limitations are there? The Seventh Circuit, in *Anderson v. University of Wisconsin*,[45] addressed this issue when a law student claimed his inadequate performance related to his alcoholism. The University readmitted him and gave him two opportunities for rehabilitation. When he still failed to meet academic requirements, he was dismissed. This dismissal was found not to violate the Rehabilitation Act.

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[33] Torres v. Bolger, 781 F.2d 1134 (5th Cir. 1986) (case decided under PA. STAT. ANN. tit 43, § 955(a) (Purdon 1955)).

[34] Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986).

[35] Oesterling v. Walters, 760 F.2d 859 (8th Cir. 1985).

[36] Pressman v. University of N.C. at Charlotte, 78 N.C. App. 296, 337 S.E.2d 644 (1985) (decided under state law).

[37] Jasony v. United States Postal Serv., 755 F.2d 1244 (6th Cir. 1984).

[38] Crancer v. Board of Regents of Univ. of Mich., 156 Mich. App. 790, 402 N.W.2d 90 (1986).

[39] School Dist. of Philadelphia v. Friedman, 96 Pa. Commw. 267, 507 A.2d 822 (1986) (decided under state law).

[40] For additional cases, see L. ROTHSTEIN, *supra* note 8, at §§ 3.02, 4.03, 4.20.

[41] 34 C.F.R. § 104.44 (1990).

[42] Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir. 1988).

[43] Samelson v. Texas Woman's Univ., (not reported) (S.D. Tex.1989).

[44] L. ROTHSTEIN, *supra* note 8, at §§ 3.03, 4.03, 4.20.

In my opinion, the University exceeded its legal obligation. While I certainly favor policies that go beyond the legal mandates, university counsel should be aware of the legal limitations. I believe that reasonable opportunity for rehabilitation in such instances is required. A university legitimately can ask why the disability was not made known earlier (*i.e.*, before the failure) and whether the individual would not have failed even if some type of accommodation had been provided. These questions will not always be easy to answer, and each situation requires its own analysis. In some cases the individual has some responsibility to identify his or her handicap to the college or university. For example, learning-disabled students with poor undergraduate grades and poor LSAT/MCAT/GRE scores who do not take an accommodated test or otherwise indicate in the application process that they have a learning disability requiring special consideration in the admission process will have difficulty claiming discrimination if denied admission.[46]

Defining what is a reasonable accommodation for a handicapped person closely relates to determining whether such person is otherwise qualified to complete the academic program. Accommodations at the university level take a number of forms—barrier-free design, academic modifications (light course loads, additional time to complete exams, waiver of certain courses), examination modifications (extra time, different format, readers), auxiliary services (readers, interpreters, tutors), and other modifications.

I frequently am asked exactly what must be provided and when. No magic checklist readily answers the question. Generally, one should ask whether an accommodation can be provided that will not fundamentally alter the nature of the program, that will not result in a safety risk to the individual or others, and that will not impose an undue administrative or financial burden on the institution.[47] This last concern is subject to disagreement. Some believe that the law requires the university to provide needed accommodations, such as a sign-language interpreter, regardless of cost. The nondecision in *Camenisch*[48] leaves this question unanswered, but the undue-burden defense could serve as the basis for claiming financial inability to provide certain costly accommodations. I suspect, however, that most colleges and universities would prefer not to have their budgets subjected to the scrutiny that would result from claiming such a defense. If other courts adopt the reasoning of *United States v. Board of Trustees for the University of Alabama*,[49] there may be some resolution to this issue. In that case, the Eleventh Circuit upheld the Department of Education's interpretation of its regulations under the Rehabilitation Act, prohibiting a university from denying auxiliary aids to handicapped students who did not demonstrate financial need. The court, however, recognized the defense of undue financial or administrative burden.

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[45] 841 F.2d 737 (7th Cir. 1988).

[46] See, *e.g.*, Salvador v. Bell, 622 F. Supp. 438 (N.D. Ill. 1985), *aff'd*, 800 F.2d 97 (7th Cir. 1986) (institution does not violate Rehabilitation Act of 1973 if it does not know of the individual's learning disability).

[47] See e.g., Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981) (denial of mentally ill student's admission to medical school not a violation of Section 504 because of legitimate concerns about safety).

Just as the cost/undue-burden issue remains unsettled, so do issues relating to the discretion of the faculty/institution to decide whether to waive a course and whether to provide an examination in a different format (for example, an essay rather than a multiple-choice test). Institutional liability for a faculty member's refusal to comply with the administration's instruction to provide a handicapped student with a particular reasonable accommodation also remains unsettled. That issue arose in recent litigation involving a Berkeley mathematics professor who refused to allow a learning disabled student additional time for an examination although the university's office for disabled-student services had recommended otherwise.[50] The case raises the complex issue of who within a university has the authority to require certain accommodations—the office for disabled-student services, the head of the department, only the provost? It illustrates the importance of addressing this question in institutional policies.

THE IMPACT OF THE AMERICANS WITH DISABILITIES ACT

On July 26, 1990, President Bush signed the Americans with Disabilities Act of 1990 (ADA).[51] In what is viewed as the most significant civil-rights legislation in twenty-five years, Congress provided the groundwork for prohibiting discrimination in employment, programs and services of public accommodation, mass transit, and other areas where such discrimination occurs on the basis of disability. A detailed review of that legislation as it applies to colleges and universities exceeds the scope of this Commentary.[52] Some of its effects on higher education should be noted, however.

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[48] University of Tex. v. Camenisch, 450 U.S. 390, 101 S. Ct. 1830 (1981). *See supra* note 19 and accompanying text.

[49] 908 F.2d 740 (11th Cir. 1990).

[50] See Dinsmore v. University of Cal. (not reported).

[51] Pub. L. No. 101-136, 104 Stat. 327 (1990).

Because the Rehabilitation Act of 1973 already covered most issues relevant to higher education and because most colleges and universities receive federal financial assistance, the ADA will not have a major impact on colleges and universities. The publicity surrounding the passage of the ADA may alert students, faculty, and staff with disabilities to the issues discussed in this Commentary, however, and an increase in litigation may result.

Colleges and universities will need to ensure that any medical screening programs (including drug screening programs) comply with the postemployment requirements of the ADA.[53] Basically, under the ADA, an employer may require an applicant for employment to submit to medical examinations and answer medical inquiries but only after offering a position to such applicant and only if the employer requires all applicants who have been offered a position to submit to such examinations and inquiries.[54] Tests to detect the illegal use of drugs do not qualify as medical examinations under the ADA.[55] Additional confidentiality and other requirements apply to employee-screening programs.

The ADA also addresses drug and alcohol use. The illegal use of drugs and alcohol, on the job or off, may be prohibited by an employer. Additionally, employers may subject employees to the same performance standards regardless of their alcohol or drug problems.[56]

Still another issue that may have particular application to colleges and universities relates to campus-transportation programs. While colleges need not immediately retrofit their existing equipment, they must henceforth purchase only accessible vehicles.[57] A detailed review of this issue exceeds the scope of this Commentary, but college administrators responsible for such systems should note this important change.

ADVICE FOR UNIVERSITY COUNSEL

In light of the current legal climate, what options exist for university counsel to avoid litigation and/or liability? Courts are reluctant to dismiss civil-rights claims. And even if ultimately the court imposes no liability, the institution has incurred significant costs in time, resources, and adverse publicity. University counsel can take several steps to avoid litigation, to the extent possible, and ultimately to succeed, if litigation occurs.

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[52] See L. ROTHSTEIN, *supra* note 8, at chapter 9, for a detailed review of the new law.

[53] See The Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 102, 104 Stat. 327, 331-332 (1990).

[54] *Id.* at § 102(c)(3)(A), 104 Stat. 327, 333.

[55] *Id.* at § 104(d)(1), 104 Stat. 327, 336.

[56] *Id.* at § 104(c), 104 Stat. 327, 336.

[57] *Id.* at § 222(a), (b), 104 Stat. 327, 339.

1. Policy Development

University counsel should take a leading role in the institution's development of a well-considered and comprehensive policy relating to students, faculty, and staff with disabilities. Many institutions already have policies of some type, but often these are not truly comprehensive.

The institution should assemble a number of individuals to develop the policy — including students, faculty, and staff with a variety of disabilities, as well as representatives from physical-plant departments, university health services, disabled-student-services programs, dean-of-students office, counseling and testing programs, academic advising, and registration. Perhaps a large group could "brainstorm" and provide feedback, while a smaller core group actually puts the policy on paper.

The policy should, at a minimum, include the following:[58]

(1) A definition of disabilities;[59]
(2) A statement of eligibility for services and accommodations, *i.e.*, medical/professional documentation of disabilities and academic or technical standards required for admission or participation;
(3) Descriptions of prohibited discriminatory actions:
    (a) in admissions or enrollment;
    (b) in hiring, promotion, and retention;
    (c) in treatment of students with regard to participation in programs or activities and with regard to academic adjustments;
(4) A designation of the person or office responsible for coordinating services and accommodations;
(5) A designation of the person or office responsible for ensuring legal compliance, including the investigation of grievances and the handling of inquiries;[60]
(6) Written grievance procedures, including how differences between faculty and students on the appropriateness of an accommodation or service will be resolved.

Because of the unique aspects of certain departments, additional departmental policies may be necessary, e.g., for a law school or a medical program.

2. Education

University counsel also should recommend an ongoing educational program relating to disability issues. Initially, a comprehensive effort may require a "dog and pony show" on the road, *i.e.*, to each department. For example, much misunderstanding still surrounds what a learning disability is, whether it is a real handicap, and what individuals with disabilities on campus require. In addition to this "lecture type" education, it is important that written materials, such as the policy itself, be distributed regularly on campus.

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[58] This policy uses that of the University of California as a model.

[59] A broad definition, using the language of the Rehabilitation Act of 1973 (29 U.S.C. 794 (1988)), the Americans with Disabilities Act, and judicial interpretations of those definitions, is recommended.

[60] It is important that the individual handling grievances not be the same individual coordinating services, because of the obvious conflict-of-interest problems.

Many campuses employ excellent individuals within the office for disabled-student services or the affirmative-action office who can assume responsibility for such education. Indeed, on many campuses, such programs already exist. In addition to written policies many colleges have developed booklets describing various handicapping conditions, the resulting academic limitations, and the types of accommodations that can compensate for these limitations.[61]

3. Confidentiality

When an agent of the university knows of an individual's disability, legitimate reasons may exist for disclosing that information to others. The university should balance these reasons against the disabled individual's interest in not having that information disclosed. The institution's policy on disability must address the issue of confidentiality, including:

(1) Who *can* be informed;
(2) Who *should* be informed;
(3) Who *must* be informed;
(4) Who should *not* be informed;
(5) When and how any related *waivers* should be obtained.

The university agents most likely to know of a student's disability are administrators in the handicapped-student service office, deans of students, admissions officers, registrars, residence-hall advisors/counselors, student-health-center personnel, and student-counselling-center personnel.

Those who may have a need to know include other students, faculty members, other administrators, campus police, professional boards of certification, prospective employers and data-collecting agencies and organizations. These individuals may need to know in order to protect the safety and health of the disabled individual, to provide appropriate accommodations, to determine the disabled individual's competency for a particular profession, or to complete statistical analyses. The disabled individual may not want that status known because of concerns about privacy, discrimination, or stigma. In some cases these concerns justify nondisclosure.

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[61] The Higher Education and Adult Training for people with Handicaps (HEATH) Resource Center at the American Council on Education may be of assistance in this regard. Their address is One Dupont Circle NW, Suite 800, Washington, DC 20036-1193.

The specific policies and practices that address these issues will depend on the specific handicapping condition (mental, health, orthopedic, or sensory impairment), the reason for disclosure, and the interests of the disabled person. For example, professors may need to know that a student has epilepsy in order to prepare a plan of action should a seizure occur during class. That student, however, may be concerned about stigma. A student with an alcohol problem may need to disclose this to a dean of students in order to obtain course-load or scheduling adjustments necessary to permit the student's attendance at counseling sessions. That same dean of students, however, may face a dilemma if asked to certify that the student is competent to enter a particular profession. It may be helpful for a residence-hall advisor to know that a student has AIDS in order to warn that student should a contagious disease, such as chicken pox, appear on campus. That student, however, will have legitimate concerns about the stigma that could attach if others knew of the condition. Students with learning disabilities may need to disclose the condition to those able to make academic modifications, but may also be concerned about discrimination or negative treatment as a result of such a disclosure.

There are few precise rules covering confidentiality regarding the disability status of individuals on campus. The law in the area remains unsettled. As a general guideline, however, disclosure of a disability should be made only to those with a legitimate need to know. If possible, the university should inform the student of the fact that disclosure may be made to certain campus personnel and the reasons for which disclosure may be necessary. Although in many cases a waiver may not be required in order to disclose disabilities to others on campus who have a need to know, disclosure to people outside the university should occur only upon securing an appropriate waiver. The more likely the possibility of stigma (such as with AIDS, alcohol addiction, or emotional problems) the more important will be the use of care in disclosure.

4. Barrier-free Issues

Unfortunately, too frequently campuses build new buildings, move major programs, or implement transportation or similar programs without considering the implications and legal mandates relating to barrier-free design. Universities must recognize the mandates[62] relating to barrier-free design, and physical-plant administrators, housing administrators, campus transportation and parking administrators, and university architects must consider these issues. University counsel can play an instrumental role in prodding their memories. Ignoring reasonable requests for ramps, parking, restrooms, and similar facilities can result in litigation.[63] Once the affected individuals decide to litigate, they are likely to "throw in the kitchen sink" in terms of the relief requested. Usually they seek changes that all universities should have made a decade ago, but, because of competing demands on resources, did not make.

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[62] See L. ROTHSTEIN, *supra* note 8, at § 3.12.

Involving individuals knowledgeable about design for disabled individuals can be very helpful and can avoid costly retrofitting later. Many facilities on campus are unique—dormitories, libraries, and stadiums, for example—and require thoughtful consideration by knowledgeable individuals before making costly changes or new construction.

Related to new construction and renovation is the issue of program relocation. When moving a program to a different facility, the issue of access should receive careful thought. University counsel must remind those on campus who make such decisions about this important issue.

The ADA requires that new buses and other vehicles used for transit programs be accessible to the disabled. Plans should begin immediately for university transit programs.

CONCLUSION

It is always a challenge to analyze the legal requirements that relate to disabled students, faculty, and staff on campus. It can be a creative and rewarding experience to provide accommodations and to address these complex issues. University counsel are in a position to apprise top-level administrators of the potential liability and adverse publicity that can result upon a failure to make the appropriate changes and to implement the necessary policies and practices.

Following some suggestions noted above should help to avoid unnecessary litigation and adverse publicity. The benefit to the disabled individuals will be full participation in the academic program; the benefit to all of us will be sharing in their contributions to society.

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[63] See, e.g., Brown v. Washington Univ., CA No. 88-1907-C-5 (settled May 11, 1990).

EMPLOYEES WITH INFECTIOUS DISEASES: TESTING AND ACCOMMODATION
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I. Introduction

The Centers for Disease Control (CDC) reported that the nation's AIDS count now stands at 206,392 cases, resulting in 133,232 deaths. Now under consideration by CDC is expansion of the official definition of AIDS that could nearly double the number of United States cases by including 160,000 people who are affected by the AIDS virus but not yet seriously ill. This will result in an increase in persons qualifying for disability either from their jobs or under Medicaid [AIDS Law & Litigation Reporter Monthly Review, January/February 1992].

II. Pre-Employment Inquiries and Medical Examinations, Pre- and Post-Employment Testing for Infectious Diseases After the Americans With Disabilities Act

A. The Americans with Disabilities Act (ADA) includes medical examinations and inquiries in its prohibition against discrimination. 42 U.S.C. Sec. 12112 (a) and (d)(1).

1. Before an offer of employment has been made to a job applicant, an employer cannot conduct a medical examination or make inquiries of a job applicant as to whether such applicant is disabled or as to the nature and severity of the disability. 42 U.S.C. Sec. 12112 (d)(2)(A) and (d)(3).

2. An employer is permitted to make pre-employment inquiries into the ability of an applicant to perform job-related functions. 42 U.S.C. 12112 (d)(2)(B).

3. Once an offer of employment is made and before the applicant begins working, an employer can require a medical examination, if:

   a. all entering employees are subjected to such an examination regardless of disability;

   b. medical information obtained is collected and maintained in separate medical files and is treated as a confidential medical record, except as needed by supervisors for work restrictions or accommodations, by emergency personnel for emergency treatment, and by the government for compliance purposes;

c. the results of the examination are used only in accordance with the ADA. 42 C.F.R. 12112 (d)(3)(A),(B),(C).

d. Medical examinations conducted in accordance with these provisions do not have to be job-related and consistent with business necessity, but if certain criteria are used to screen out an applicant with disabilities as a result of the examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity, and the employer must show the individual cannot be reasonably accommodated. 29 C.F.R. 1630.14

4. An employer cannot require medical examinations and make inquiries of its current employees as to whether they are disabled or the nature or severity of the disability, unless such examination or inquiry is job-related and consistent with business necessity. 42 C.F.R. 12112 (d)(4)(A).

B. Testing for HIV/AIDS (as well as other infectious diseases) may be permissible under the ADA if:

1. An individual with HIV infection in a particular job classification (e.g. a health care worker who performs "exposure-prone" invasive procedures) would pose a "direct threat" to the health and safety of others (thus is not a "qualified individual with a disability" under the ADA);

2. All persons in that job classification are tested for HIV as a condition of employment after an offer of employment has been extended;

3. A positive test result, if used to exclude an individual from employment in a job classification:

a. can be shown to be a job-related criterion and consistent with business necessity; and

b. the employer can establish that the individual cannot perform the job safely with reasonable accommodation.

C. Public universities need to also consider possible federal and state constitutional constraints on HIV testing. See e.g. Glover v. Eastern Nebraska Community Office of Retardation et al., 867 F.2d 461 (1989). Public and private universities also need to review applicable state legislation that may regulate testing.

III. Is a Person With An Infectious Disease a "Qualified Individual With a Disability?"

A. Americans With Disabilities Act, 42 U.S.C. Sec. 12113(a) and (b) provide:

1. (a) ..."It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title."

2. (b) ..."The term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the work place."

3. The term "direct threat" is defined in Sec. 12111 (3) of the Act as a ..."significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."

4. The Senate bill (S. 933) had included as a defense that a covered entity could fire or refuse to hire a person with a contagious disease if the individual posed a direct threat to the health and safety of other individuals in the work place. The House amendment made the provision applicable to all applicants and employees, which is the language of the enacted legislation.

B. The EEOC Regulations To Implement The Equal Employment Provision of the Americans With Disabilities Act (29 C.F.R. 1630 et. seq, 1991) further define the terms "qualification standards" and "direct threat".

1. 29 C.F.R. 1630.2(q): "Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired."

2. 29 C.F.R. 1630.2(r): "Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot

be eliminated or reduced by reasonable accommodation. The determination that an individual poses 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm."

3. In the Appendix to 29 C.F.R. 1630 - Interpretative Guidance, the EEOC states with respect to the definition of a "direct threat:"

    a. "An employer ... is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e., high probability, of substantial harm; a speculative or remote risk is insufficient."

    b. "Determining whether an individual poses a significant risk of substantial harm to others must be made on a case by case basis."

    c. "Relevant evidence may include input from the individual with a disability, the experience of the individual with a disability in previous similar positions, and opinions of medical doctors, rehabilitation counselor, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability."

    d. "The assessment that there exists a high probability of substantial harm to ... others, must be strictly based on valid medical analyses and/or other objective evidence. This determination must be based on individualized factual data, using the factors discussed above, rather than on stereotypic or patronizing assumptions and must consider potential reasonable accommodations. Generalized fears about risks ... cannot be used ...."

C. School Board Of Nassau County v. Arline, 480 U.S. 273

(1987) - In a case decided under Section 504 of the Rehabilitation Act of 1973, the United States Supreme Court held a school teacher with recurring relapses of tuberculosis had a record of impairment and was a handicapped person under the Act. In the Court of Appeals decision on Arline, which the Supreme Court affirmed, the appeals court directed the district court to consider whether the school board could reduce the risk of infecting others to an acceptable level by making reasonable accommodations. Arline v. School Board of Nassau County, 772 F.2d 759 (11th Cir. 1985).

D. Does an Applicant/Employee Who is HIV positive or has AIDS Pose a "Direct Threat" or "Significant Risk" as Defined by the ADA and Its Implementing Regulations?

1. Public Perception of Risk

CDC has reported, based on combined results of 43 different surveys, that while Americans generally believe there is little risk of HIV transmission from casual contact with a person who has AIDS, 70 percent said they would ban individuals who were HIV positive from working at any type of job, 53 percent would ban HIV positive workers from health care jobs, 43 percent would ban them from restaurant jobs and 42 percent would ban them from schools. More than half of the survey respondents favored mandatory testing for these and other groups of people. [AIDS Law & Litigation Reporter Monthly Review, October 1991]

2. Medical/Scientific Risk In General

CDC has reported that there is no reported risk in casual contact, which covers most work place settings. 36 MMWR 3S, 9S (No. 2S August 21, 1987).

3. Medical/Scientific Risk Assessment in a Health Care Setting

a. Using a preliminary risk model, CDC has estimated the risk of an HIV-infected surgeon giving the disease to a patient during surgery from 1 in 41,667 to 1 in 416,667 [J. Gerberding, M.D., M.P.H. Expected Costs of Implementing a Mandatory Human Immunodeficiency Virus and Hepatitis B Virus Testing and Restriction Program for Healthcare Workers Performing Invasive Procedures, 12 Infection Control and Hospital Epidemiology 443 (July 1991)].

b. CDC has identified five cases of patients infected by a health care worker - all by the same dentist in Florida. According to former Surgeon General C. Everett Koop and Dr. M. Roy Schwarz, senior vice president of the American Medical Association, speaking at a news conference last August, the real facts regarding how the transmission occurred may never be known. What is known is that the dentist did not always wear gloves, sometimes did not sterilize his instruments, or wash his hands. He was also a bisexual with numerous partners and he cared medically for some of his partners.

4. In a general classroom setting, there would not appear to be a medical or scientific reason for excluding a faculty member who was HIV positive or who had AIDS from a classroom setting. See e.g. Chalk v. U.S. District Court, 840 F.2d 701 (9th Cir. 1988)(A teacher with AIDS was ordered restored to classroom duties. The casual contact between children and AIDS-infected people is not dangerous, the court said and placing the teacher in a non-teaching job violated his rights).

5. However, there may be certain classifications in other university settings where the threat or risk of HIV transmission is possible and the significance of the risk must be evaluated.

   a. The ADA has a specific defense for employers related to infectious and communicable diseases which may be transmitted through handling food, (42 U.S.C. Sec. 12113(d)), if the disease is identified by the Secretary of Health and Human Services as the type of disease transmitted through food handling. Apparently, HIV has not been so identified.

   b. Health care workers - with respect to transmission of HIV and Hepatitis B (HBV) from health care workers to patients in a health care setting:

      1). The CDC has distinguished among health care workers who perform non-invasive procedures, invasive procedures and exposure-prone invasive procedures, concluding that only the latter group should be subject to practice restrictions, provided the others use appropriate sterilization/disinfection techniques and comply with universal precautions. 40 MMWR 1, 5 (No. R.R. 8, July 12, 1991)

2). The definitions of non-invasive, invasive, and exposure-prone invasive procedures has sparked great debate. The CDC apparently has backed away from its plan to list exposure-prone invasive surgical procedures (6 AIDS Policy & Law Newsletter 1 (November 28, 1991) in the face of massive opposition from professional medical associations.

3). Commentators have argued that there is no basis for restricting the practice of health care workers that do not perform procedures that invade a body cavity. Touching and manipulation of the patient's intact skin, while practicing infection control, renders the risk close to zero. Patients cannot expect a 100% risk-free environment. The pressure to exclude health care workers infected with HIV "appears to have more to do with exaggerated notions of risk, the misplaced ethical judgment that no risk is acceptable, and a concern about patient or customer preferences." L. Gostin, The HIV-Infected Health Care Professional: Public Policy, Discrimination and Patient Safety, 18 Law, Medicine & Health Care 303, 305 (Winter 1990).

4). Others point out that if the standard for HIV-infected health care workers is that there be "no identifiable risk" of transmission to patients, that is a much higher standard than is used for other disabilities or conditions affecting health care workers (aging, stress, fatigue, marital problems, psychiatric treatment, medication side-effects, drug or alcohol use) which present risks much more readily "identifiable." Barnes, Rango, Burke, Chiarello, The HIV-Infected Health Care Professional: Employment Policies and Public Health, 18 Law, Medicine & health Care 311, 315 (Winter 1990).

5). However, with respect to "seriously" invasive procedures, it is argued that there is reason to believe cases of transmission from HCW to patient will occur, although infrequently, because the mode of HIV transmission (blood-to-blood) is well-established. The risk to a single patient may be low, but there is a cumulative risk to patients that HCW treats. Waiting for cases of infection, as is done for cases involving HBV, before taking action would undermine confidence in the health care system. Gostin, supra.

6. Leckelt v. Board of Commissioners of Hosp. Dist. No. 1, 714 F. Supp 1377 (E.D. La. 1989), aff'd 909 F.2d 820 (5th Cir. 1990) - The Fifth Circuit upheld a district court decision that held a hospital not liable for the discharge of a nurse engaged in "direct patient care" for failure to report HIV test results. The district court found that the hospital, in order to fulfil its obligation to employees and the public regarding infection control and health and safety, had a right to require such testing of employees with a high risk of contracting HIV. The appeals court found that the plaintiff was not terminated solely because of his handicap under Section 504 of the Rehabilitation Act of 1973, but for his failure to comply with the hospital's employee infection reporting policy. Further, plaintiff was not "otherwise qualified" to perform the essential functions of the job, because his refusal to provide test results prevented the hospital from knowing if he was handicapped and making reasonable accommodation. Finally, the appeals court rejected plaintiff's equal protection and constitutional privacy arguments, by holding that the hospital had a compelling interest in enforcing its infection control policies to protect the safety of others and that the substantial interests of the hospital outweighed the plaintiff's privacy rights in his HIV test results.

III. Is it Feasible To Test All Persons in A Particular Job Classification?

A. The cost of mandatory HIV testing and practice restriction for healthcare personnel performing invasive procedures has been estimated for a 350-bed university-affiliated public teaching hospital as over $860,000 in the first year. This estimate is based on the cost of testing over 1,000 physicians, residents, students, nurses and paramedics who perform invasive procedures, the cost of routine pre-procedure testing of patients undergoing invasive procedures, the costs of replacing, retraining, and reassigning infected healthcare workers, and notification and testing of patients treated by health care workers later identified as being HIV positive. Gerberding, supra.

B. In Leckelt, the issue of test results arose when plaintiff's roommate was admitted as a patient to the hospital where plaintiff worked and was diagnosed with AIDS.

IV. Is Testing for Infectious Diseases Job-Related and Consistent With Business Necessity?

A. Efficacy of HIV Testing

A negative test result does not guarantee an individual is free from infection. It generally takes six to eight weeks before infected persons produce antibodies which are detected by current assays. Further, an individual can contract the infection in the future. Periodic retesting would be necessary to ensure that individuals are free from infection. Gostin, supra.

B. Liability Concerns of Not Testing for HIV

1. "The future of HIV testing has almost nothing to do with actuarial facts or risk assessments. Our health care system is driven by liability concerns. It will only take a few more million-dollar awards to infected patients before insurance companies and those who write malpractice insurance insist on testing as a precondition for coverage." Arthur Caplan, director of the Center for Biomedical Ethics at the University of Minnesota at a 1991 CDC conference [2 Biolaw U:1976 (April 1991)]

2. Suits have been filed by patients after the patients were notified through hospital "look back" programs that they had been treated by an HIV positive healthcare worker.

a. Wolgemuth v. Milton S. Hershey Medical Center, Dauphin County Court, Docket No. 2694. S 1991, 6/24/91 - A class action alleging negligence was filed five days after two Pennsylvania hospitals announced an obstetrics-gynecology resident had tested positive for HIV. Suit alleges some of the doctor's patients are expected to contract AIDS from their contact with the physician, while others are suing because of fear and anxiety experienced after announcement. Suit sought damages of more than $100,000 from each hospital based on negligence, vicarious liability, corporate negligence, lack of informed consent, and loss of consortium. Suit charged hospitals failed to follow state regulations for dealing with infectious diseases and health industry standards for dealing with physicians infected with HIV.

b. In Rossi v. Almaraz et al. and Faya v. Almaraz et al., Baltimore City Circuit Court, Nos.90344028 CL 123396; 90345011 CL 123459; 5/23/91 - the plaintiffs sued a breast cancer surgeon and Johns Hopkins Hospital, charging negligence, lack of informed consent, fraudulent misrepresentation, loss of consortium, intentional infliction of emotional distress and breach of contract, because the surgeon operated on the plaintiffs knowing that he was HIV positive and later that he had AIDS. The judge dismissed the cases, however, concluding that fear of exposure to AIDS, without proof of exposure (i.e., without a positive HIV test), was not a compensable injury, given the remote likelihood of transmission when using proper barrier techniques.

3. Given the debate over mandatory testing and whether there is scientific evidence to support mandatory testing, it seems unlikely that a court would hold a university or hospital negligent for failure to mandate testing for its workers or students.

   a. However, it is likely the CDC's "Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures," 40 MMWR 1 (No. R.R. 8 July 12, 1991) and any state law implementation of such guidelines would constitute a duty on a university or hospital to establish policies and procedures consistent with such guidelines and/or state law, and that failure to do so may result in significant tort liability to patients who contract HIV or HBV from infected healthcare workers.

1). In November 1991 Congress adopted legislation ordering state health departments to develop guidelines for preventing the transmission of HIV and hepatitis B during exposure-prone medical procedures, states are called upon to develop equivalent guidelines to those used by the CDC or to adopt the CDC guidelines themselves. Not clear how flexible federal officials will be since some state policies clearly differ from CDC guidelines.

2). Effective September 1, 1991, Texas law makes the CDC guidelines mandatory. Tex. Health and Safety Code Ann. Sections 85.201-.206).

b. Aspen Valley Hospital in Colorado will soon require annual HIV tests as a requirement for staff membership and privileges for its medical staff. Not yet extended requirement to non-staff physicians and staff employees engaged in invasive procedures. May be the first to adopt mandatory testing requirement.

c. CDC does not recommend mandatory testing, but does recommend that health care workers that perform exposure-prone invasive procedures should now their HIV antibody status. AMA opposes mandatory testing but suggests AIDS tests for doctors who perform invasive procedures.

V. Is It Possible For a Person With An Infectious Disease to Safely Perform a Job With Reasonable Accommodation?

1. The ADA defines discrimination to include an employer's failure to make reasonable accommodation to the known physical or mental limitation of an otherwise qualified disabled individual, unless that accommodation would impose an undue hardship on the operation of the business of the employer. 42 U.S.C. Sec 12112(b)(5)(A).

2. Reasonable accommodation may include job restructuring, part-time or modified work

schedules, reassignment to a vacant position, acquisition or modification of equipment or devices and other similar accommodations for individuals with disabilities. 42 U.S.C. 12111(9).

3. Accommodation issues (Shaller, "Reasonable Accommodation" under the Americans with Disabilities Act - What Does It Mean?" 16 Employee Relations L. J. 431 (Spring 1991):

   a. An employer is not required to create a job for a disabled employee,

   b. An employer is not required to hire someone else to perform the majority of the essential functions of the disabled employee's job,

   c. It is not clear to what extent other employees may be adversely affected, and to what extent collective bargaining agreements may be breached, before particular accommodations will not be required,

   d. Job restructuring does not require fundamentally altering the essential functions of the job, but may include reassigning non-essential functions to other employees,

   e. Job reassignment does not require "bumping" other employees, and can involve assigning disabled persons, on a voluntary basis, to less onerous jobs with lower pay,

   f. Flexibility in scheduling may be necessary to accommodate medical treatments, frequent rest periods

4. Universal Precautions and Reasonable Accommodation

III. ISSUES PECULIAR TO FACULTY

Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom"

Michael A. Olivas*

I. INTRODUCTION

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.[1]

Academic freedom, a concept often used to defend a variety of speech and conduct that occurs on our nation's campuses, is poorly understood and ill-defined. It is rooted in European traditions,[2] and in the recognition that "[i]nstitutions of higher education are conducted for the common good . . . [which] depends upon the free search for truth and its free exposition."[3] This essay attempts to shed some light on the different dimensions of the academic freedom doctrine, with special attention devoted to the emergence

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[1] Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting a statement of a conference of senior scholars from the University of Capetown and the University of Witwatersrand, South Africa).

[2] The German principles of *Lehrfreiheit* and *Lernfreiheit* were transplanted into U.S. soil, giving root to more formal academic freedom principles and jurisprudence: "By *Lehrfreiheit* the German professor meant the right of the university professor to freedom of inquiry and to freedom of teaching, the right to study and to report on his findings in an atmosphere of consent." Frederick Rudolph, The American College and University: A History 412 (1962) (footnote omitted). "*Lernfreiheit*, the freedom of the student, assumed less importance in the American definition, in part perhaps because the elective curriculum was enlarging the domain of student freedom." *Id.* at 413.

[3] Academic Freedom and Tenure: 1940 Statement of Principles and 1970 Interpretive Comments, *reprinted in* American Association of University Professors, Policy Documents & Reports 3 (6th ed. 3d prtg. 1989) [hereinafter AAUP Policy Documents & Reports]; *see also* Matthew W. Finkin, *"A Higher Order of Liberty in the Workplace": Academic Freedom and Tenure in the Vortex of Employment Practices and Law*, Law & Contemp. Probs., Summer 1990, at 357; Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, Law & Contemp. Probs., Summer 1990, at 3; David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, Law & Contemp. Probs., Summer 1990, at 227; Mark G. Yudof, *Three Faces of Academic Freedom*, 32 Loy. L. Rev. 831 (1987).

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of classroom conflicts that often pit the rights of teachers against the rights of students.

The American Association of University Professors (AAUP) defines academic freedom as encompassing three primary facets:

> (a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of . . . other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
>
> (b) The teacher is entitled to freedom in the classroom in discussing [his or her] subject, but . . . should be careful not to introduce into [his or her] teaching controversial matter which has no relation to [his or her] subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.
>
> (c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When [a professor] speaks or writes as a citizen, [he or she] should be free from institutional censorship or discipline, but [his or her] special position in the community imposes special obligations. As [scholars] and . . . educational officers, [they] should remember that the public may judge [their] profession and [their] institution by [their] utterances. Hence [they] should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that [they are] not . . . institutional spokes[persons].[4]

The search for truth requires that scholars receive the protection of academic freedom in posing new, controversial, or unpopular ideas in their teaching and research. The tradition of academic freedom has been translated into practice by several means, particularly constitutional interpretations of the First Amendment penumbral rights protecting the freedoms of inquiry, thought, and choice of what to teach. These rights of academic freedom are most evocatively articulated by Justice Douglas in *Griswold v. Connecticut*:

> The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.
>
> . . . [T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community. Without those peripheral rights the specific rights would be less secure.[5]

First Amendment protection requires that state action be present, and may therefore provide only minimal protection for faculty in private institutions. As a result, protection of academic freedom in private institutions must stem from state constitutional protections that reach private institutions or from contract principles.[6] Contract law may provide protection if AAUP Principles on Academic Freedom and Tenure or other customs or practices are adopted in the employment contract (expressly or by implication).[7] Recently, as a result of collective bargaining or other organized labor activity, there has been a trend towards explicit protection of academic freedom in faculty contracts.[8]

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[4] AAUP POLICY DOCUMENTS & REPORTS, *supra* note 3, at 3-4 (footnotes omitted).

[5] Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965) (citations omitted).

II. BACKGROUND: ACADEMIC FREEDOM AND GENERAL CONFLICTS BETWEEN TEACHERS AND INSTITUTIONS

The most interesting debates regarding our traditional understanding of academic freedom have been attempts to reconcile the concept's essentially paradoxical nature: It protects quite expansively the scholarly enterprise from outside interference (grand juries, witch-hunting public officials, funding agencies, and other assorted patrons, critics, and "do-gooders"), but only grants limited protection to professors' intramural speech or classroom activities against *institutional* interests. For scholars in this fertile field, academic freedom has been a search for the perfect professional paradigm.

A. *Theories of Academic Freedom*

The eminent historian, Walter Metzger, describes the AAUP's 1940 Statement as "three axiomatic dedications to principle,"[9] but allows that such "conceptual mappings" chart a hilly terrain:

> And though most who do these conceptual mappings divide academic freedom . . . into three main parts, some insist that good logic would divide it into only two (freedom to teach and freedom to do research, arguably the

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[6] For example, in the case of a tenured Stanford University professor dismissed for advocating violence, the court only considered the merits of the professor's First Amendment claim because the institution took the position that it should be treated as if it were a public employer. Franklin v. Leland Stanford Junior Univ., 172 Cal. App. 3d 322, 328 n.3, 218 Cal. Rptr. 228, 230 n.3 (1985) ("We do not here decide that First Amendment free speech principles apply to Stanford or any private institution. The faculty advisory board which recommended plaintiff's termination committed the University in this case to affording him the same constitutional protection as that available were he employed by a state school.").

[7] *See* Linn v. Andover-Newton Theological Sch., 638 F. Supp. 1114 (D. Mass. 1986) (applying AAUP regulations as part of college contract); *see also* Hill v. Talladega College, 502 So. 2d 735, 737 (Ala. 1987) (assuming, but not deciding, that AAUP principles not explicitly incorporated into contract but discussed in faculty handbook are part of the employment contract).

[8] In Lansing Community College v. Association for Higher Education, 161 Mich. App. 321, 409 N.W.2d 823 (Ct. App. 1987), *vacated and remanded*, 429 Mich. 895, 418 N.W.2d 95 (1988), *aff'd*, 171 Mich. App. 172, 429 N.W.2d 619 (Ct. App. 1989), a professor was dismissed from his tenured position for serving marijuana-laced brownies to his students. An arbitrator reinstated him, according to authority granted her by a collective bargaining agreement. The appeals court upheld the arbitrator's decision, holding that the agreement allowed dismissals only for just cause. *See generally* George Roumell, *The Impact of Free Speech on Arbitral Review of Discipline in the Public Sector*, 1992 DET. C.L. REV. 807.

[9] Metzger, *supra* note 3, at 8.

> only professionally relevant freedoms, with citizen or extramural freedom ceded to the large neighboring country of ordinary civil liberties), and a few would divide it into four (the three that go with the faculty's rules plus one attached to the students' status) or even five (all of the four individual academic freedoms, along with institutional academic freedom, also known as institutional autonomy).[10]

One of the most careful legal scholars of academic freedom, William Van Alstyne, has consistently tried to draw principled distinctions between free speech in general and the more particular concept of academic freedom.[11] The Supreme Court has characterized academic freedom as a "special concern" of the First Amendment.[12] The concepts of free speech and academic freedom are symmetrical and overlapping, not synonymous. Van Alstyne has noted that the AAUP's 1915 Declaration[13] set out academic freedom protections for professors, but also exacted reciprocal professional obligations, including the obligation to adhere to faculty norms and standards both in teaching and in reviewing other colleagues' work.[14] The 1915 Declaration established contours for faculty peer evaluations which should only be overridden by higher institutional bodies when impartial professorial review procedures and norms are not employed.[15]

Mark Yudof characterizes academic freedom as encompassing "three faces": personal autonomy; government expression; and institutional authority.[16] In a series of well-researched essays, Dean Yudof has explored these three faces, arguing persuasively against a unitary notion of academic freedom, insisting instead on consideration of the "multiple strands of the concept."[17] Matthew Finkin, in contrast, argues for a single, well-developed professional autonomy face. He identifies as a possible historical antecedent "the pre-industrial artisanal ideal,"[18] "an ideal [to] which the nation may be returning in some aspects of the unfolding law of employment."[19] Usefully, Professor Finkin provides examples of how his conception of academic freedom would operate in a world governed not by the traditional rationale expressed in *Pickering v. Board of Education*,[20] which granted broad protection to the speech of public employees, but by an emerging view articulated in *Connick v. Myers*,[21] which accords greater weight to public employers' need for worker "discipline . . . and . . . harmony."[22]

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[10] *Id.* at 8-9 (footnotes omitted).

[11] William Van Alstyne, The Specific Theory of Academic Freedom and the General Issue of Civil Liberty, *reprinted in* The Concept of Academic Freedom 59, 61-63 (Edmund L. Pincoffs ed., 1972).

[12] Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

[13] *General Report of the Committee on Academic Freedom and Academic Tenure (1915), reprinted in* Law & Contemp. Probs., Summer 1990, at 393 app. [hereinafter *General Report (1915)*].

[14] Van Alstyne, *supra* note 11, at 61-63; *see also* William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, Law & Contemp. Probs., Summer 1990, at 79.

[15] *General Report (1915)*, *supra* note 13, at 402-06.

[16] Yudof, *supra* note 3.

[17] *Id.* at 858; *see also* Mark G. Yudof, *Intramural Musings on Academic Freedom: A Reply to Professor Finkin*, 66 Tex. L. Rev. 1551 (1988) [hereinafter Yudof, *Intramural Musings*]; Mark G. Yudof, *When Government Speaks: Toward a Theory of Government Expression and the First Amendment*, 57 Tex. L. Rev. 863, 876-82 (1979) [hereinafter Yudof, *Government Expression*].

[18] Finkin, *supra* note 3, at 378.

[19] *Id.* at 379.

B. *From* Pickering *to* Connick

Before the *Connick* decision, several professors whose unpopular activities had gotten them fired won cases requiring their reinstatement. These cases represented the views of *Pickering*, which expressed a broad notion of protected professorial activities against institutional interests. For example, in *Starsky v. Williams*,[23] the court ordered the university to reinstate Professor Starsky, an untenured professor who was dismissed after missing classes in order to attend an off-campus rally. In the court's view, the University's Board and President had impermissibly dismissed him:

> [T]he Board fails to distinguish those circumstances in which Professor Starsky spoke as a professional, under circumstances where the interests of the school balanced First Amendment interest sufficiently to warrant a narrower professional standard of speech, from those circumstances in which [he] spoke publicly as a citizen and had the right to the same broad constitutional protection afforded every citizen.[24]

The court found that "the major emphasis in the charges is so clearly based upon protected ideology, that . . . the primary reason for the discipline of Professor Starsky is grounded in his exercise of his First Amendment rights in expressing unpopular views."[25]

Connick[26] significantly changed the contours of the right of public employees to dissent, either publicly or privately. Within a year of *Connick*, college professors were consistently losing claims that they might have won under the broader conception of protected activities in *Pickering*.[27] One district court, in exemplifying this trend, held that the *Pickering* line of cases "would have been [decided] different[ly] under *Connick*":[28]

> In frankness, the court must state that it reads *Connick* as deliberately intended to narrow the scope of [*Pickering* cases], even though they were not expressly overruled. A careful study of all these decisions leads to the inevitable conclusion that the First Amendment in the employment context is now to be more narrowly interpreted to give greater scope to the legitimate rights of governmental entities as employers, and also to reduce the burdens on the courts caused by the burgeoning of litigation initiated by the deci-

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[20] 391 U.S. 563 (1968).

[21] 461 U.S. 138 (1983).

[22] Finkin, *supra* note 3, at 368.

[23] 353 F. Supp. 900 (D. Ariz. 1972), *aff'd in part, rev'd in part on procedural grounds*, 512 F.2d 109 (9th Cir. 1975).

[24] *Id.* at 921.

[25] *Id.* at 927.

[26] 461 U.S. 138 (1983).

[27] 391 U.S. 563 (1968).

[28] Landrum v. Eastern Ky. Univ., 578 F. Supp. 241, 247 (E.D. Ky. 1984).

sions upon which plaintiff relies here.[29]

Professor Finkin, echoing William Van Alstyne, proposes a stronger core of freedom of inquiry, joined to First Amendment jurisprudence, than that expressed in *Connick*. Notwithstanding Dean Yudof's[30] and Dean Paul Brest's[31] demurrers, Finkin's proposal grants faculty broader intramural speech rights than are afforded under the restrictive *Connick* covenant, rights which are grounded in the artisanal guild archetype.

III. ACADEMIC FREEDOM IN THE SPECIFIC CONTEXT OF CONFLICTS WITHIN THE CLASSROOM

The tableau I turn to is one that virtually any theory of academic freedom would recognize and protect, the third of *Sweezy's* "Four Essential Freedoms," the freedom to determine how materials shall be taught in the classroom.[32] Large enrollment lectures, high technology laboratories, satellite-transmitted learning, and computer-assisted instruction have moved today's learning environment away from the ideal of studying with Mark Hopkins on one end of a log.[33] Nonetheless, the interaction between teacher and student is still the uncontested heart of the university. While there are many cases involving administrative or external controls upon what to teach or how it should be taught, there are few cases arising from student objections to professorial prerogatives. The paucity of student dissatisfaction taken to court is due in part to the relative powerlessness of students, but is also clearly attributable to the nearly absolute autonomy accorded professors under traditional academic freedom norms. However, several recent developments indicate that teaching styles and methodologies may be open to greater scrutiny. Some of these issues are old wolves guised in new clothing; but several pose new and unexplored questions for Yudof's "first face," that of personal autonomy.

The law appears to have carved out a majestic *cordon sanitaire* around college classroom instruction as against institutional interference, protecting professors from governmental intrusion. For example, the Supreme Court protected foreign language instruction in *Meyer v. Nebraska*,[34] citing "the calling of modern language teachers."[35] The Court protected visiting professors in *Sweezy v. New Hampshire*,[36] inveighing against "an atmosphere of suspicion and distrust."[37] *Keyishian v. Board of Regents*[38] and *Weiman v. Updegraff*[39] protect public employment contracts by striking down loyalty oaths and characterizing teachers as "priests of our democracy."[40] Other facets of the teacher-student relationship are protected in the *Epperson v. Arkansas*,[41] *Tinker v. Des Moines Independent School District*,[42] and *Edwards v. Aguillard*[43] line of cases, which upholds professional autonomy interests against governmental restrictions. This magnificent line of cases, though, protects the interests of college institutions against state legislatures, not individual faculty members in their professional autonomy capacity.

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[29] *Id.*

[30] Yudof, *Intramural Musings*, *supra* note 17, at 1351. Dean Yudof prefers more modest claims for academic freedom: Professor Finkin "has not identified a set of arguments unique to academicians or academic freedom." *Id.* at 1357.

[31] Paul Brest, *Protecting Academic Freedom Through the First Amendment: Raising the Unanswered Questions*, 66 TEX. L. REV. 1359 (1988). Dean Brest, offering several critiques, notes that "[Finkin's] claim that the penumbra of intramural speech is inextricably linked to the core of true academic freedom of inquiry needs a stronger argument than I have heard so far." *Id.* at 1361 (footnote omitted).

[32] *See* text accompanying note 1 *supra*.

[33] An early president of Williams College, Mark Hopkins, was reputed to be an extremely inspirational teacher: "The ideal college was Mark Hopkins on one end of the log and a student on the other." FREDERICK RUDOLPH, MARK HOPKINS AND THE LOG: WILLIAMS COLLEGE, 1836-1872, at 227 (1956).

[34] 262 U.S. 390 (1923).

An emerging line of cases, however, tests the contours of faculty members' professional autonomy relative to students' expressive rights, rather than institutional authority. Although the *Tinker* case-lineage[44] appears to give broad sweep to the ostensibly contemporaneous rights of students and faculty,[45] it is inevitable that their respective rights will be in conflict. Generally, in any situation in which students' rights are pitted against those of faculty, academic tradition will prevail and faculty rights will triumph.

A. *Race Relations—An Example of Conflict Between Student and Teacher Rights*

The tragic history of race relations in the United States has made any discussion of the subject very difficult for both teachers and students. Teachers and students come to class with longstanding experiences and fears about the subject of race. An entire eloquent law review literature, "Critical Race Theory," has developed, which uses stories, fables, and racial references to illustrate the race implications of legal doctrines.[46] In many institutions, the increasing presence of students of color and minority professors has prompted consideration of race in the classroom.

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[35] *Id.* at 401.

[36] 354 U.S. 234 (1957).

[37] *Id.* at 250.

[38] 385 U.S. 589 (1967).

[39] 344 U.S. 183 (1952).

[40] *Id.* at 196.

[41] 393 U.S. 97 (1968).

[42] 393 U.S. 503 (1969).

[43] 482 U.S. 578 (1987).

[44] *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (upholding right to informal hearing before disciplinary dismissal).

[45] "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506.

[46] *See, e.g.*, Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1987); Derrick Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 Harv. L. Rev. 4 (1985); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331 (1988); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411 (1989); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 Va. L. Rev. 461 (1993); Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 Mich. L. Rev. 2128 (1989).

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At Stanford, Professor William Shockley, a Nobel Prize-winning professor of engineering, was administering a quiz in his electrical engineering course when fifteen students entered his classroom and challenged him to a debate over his views on race.[47] The students characterized Shockley's published views on eugenics as "racist" and called his work "Nazi race theory."[48] The students, disciplined by the University, brought both Section 1983 and First Amendment claims, arguing that Professor Shockley "must debate his views publicly if challenged."[49] The court held that he had no obligation to respond to the challenges in class: "Such a requirement would in itself be a potential inhibitor of academic freedom, since many individuals simply do not have the personality or talents to perform comfortably and adequately in oral debating."[50]

But the court could have avoided this broad formulation, as the students were not even enrolled in Shockley's engineering class, and, moreover, the class did not concern genetics. Further, the students chose an exam day to provoke the issue. In sum, they had no standing to assert free-floating First Amendment rights, and the judge correctly dismissed their claims.

Fifteen years later, another student challenge to a professor's authority occurred at Stanford, this time at the law school. Derrick Bell, a visiting professor from Harvard Law School, was teaching an introductory constitutional law course. He used the same text as the professors teaching the other two sections, but employed some "nontraditional" teaching methods. In particular, Bell provided a "racial perspective" to discussion of individual rights.[51] After a few weeks, a small group of white students, complaining that they were not learning the "law" in Professor Bell's class, approached the dean to organize a series of "enrichment" lectures intended to supplement Professor Bell's course. When the Black Law Student Association discovered and publicized the purpose of the series, Professor Bell and many students protested, forcing cancellation of the series.

Once again, Stanford student protests were mired in racial controversy. This time, however, the protestors were white while the professor was black. White students claimed that the issue was teaching methodology, while students of color and Professor Bell believed the issue was Professor Bell's views on race. Furthermore, rather than disrupting classes to protest a professor's philosophical views on race, as had occurred in the prior incident, these students silently boycotted the class and convinced other faculty members of the need to organize a series of shadow lectures. In addition, Professor Bell—a distinguished scholar and founder of the Critical Race Studies legal movement—was teaching within his specialty, Constitutional Law, in which issues of race are a central topic; Professor Shockley, meanwhile, did not teach his controversial views on eugenics in his engineering course.[52]

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[47] Furumoto v. Lyman, 362 F. Supp. 1267 (N.D. Cal. 1973).

[48] *Id.* at 1272.

[49] *Id.* at 1282.

[50] *Id.*

[51] Derrick Bell, *The Price and Pain of Racial Perspective*, *in* MICHAEL A. OLIVAS, THE LAW AND HIGHER EDUCATION: CASES AND MATERIALS ON COLLEGES IN COURT 1038 (1989).

A third case offers an interesting counterpoint to the two incidents at Stanford. In *Levin v. Harleston,*[53] a tenured professor of philosophy at the City College of New York (CCNY), Bernard Levin, had, like Shockley, written that blacks were less intelligent than whites.[54] Although students had not formally complained that he acted upon these beliefs in class, CCNY began scheduling alternative shadow sections of his courses, which met at the same time as his sections.[55] As a result, there was a drop in enrollments in Professor Levin's courses. He sued on the ground that he had been stigmatized because of his political views, which he had not expressed in class. The appeals court found that CCNY had violated his academic freedom:

> Formation of the alternative sections would not be unlawful if done to further a legitimate educational interest that outweighed the infringement on Professor Levin's First Amendment rights. However, although appellants contended below that they created the alternative sections because Professor Levin's expression of his theories outside the classroom harmed the students and the educational process within the classroom, the district court saw no evidence that this was a factually valid concern. Given the complete lack of evidence to support appellants' claim of a legitimate educational interest, we are unable to say that the district court erred.[56]

B. *A "Professorial Function" Approach to Academic Protection*

These three examples reveal the appeal of Professor Van Alstyne's specific constitutional theory of academic freedom: Professors Shockley, Bell, and Levin were all teaching within their trained fields of professorial competence. Not to allow faculty to teach on all matters within their professional expertise would undermine the autonomy essential to critical inquiry, and would deny students (and by extension, the community) the fruits of professors' labors. Professor Van Alstyne notes that, at many institutions, professors are required to publish and disseminate their work; it would thus be counter-productive to forbid or limit their expression.[57] *Edwards v. Aguillard*,[58] which struck down a Louisiana statute that favored the theory of creationism over that of evolution, indicates that a university which insists upon a particular orthodoxy in class violates the First Amendment's protection of academic freedom. This should especially be true when the professor is teaching within his or her field of specialty. Under this reasoning, Professor Van Alstyne would presumably find no protected right for Professor Shockley to discuss eugenics in his engineering class. Professor Bell, meanwhile, would be protected in his treatment of slavery and the role of race in the U.S. Constitution. It is not immediately clear whether Professor Levin, trained as a philosopher, would be allowed to incorporate pychometric and developmental psychology research as well as statistical evidence into an introductory philosophy course for the purpose of proving lower black intelligence.[59]

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[52] Professor Shockley wanted to teach a course on eugenics, but the University denied him the opportunity. Wallace Turner, *Stanford Vetoes Shockley Course: Professor Sought to Teach Disputed I.Q. Theories*, N.Y. TIMES, May 2, 1972, at A9.

[53] 770 F. Supp. 895 (S.D.N.Y. 1991), *aff'd in part, vacated in part*, 966 F.2d 85 (2d Cir. 1992).

[54] In one letter published in the American Philosophical Association Proceedings, Professor Levin wrote:

> It has been amply confirmed over the last several decades that, on average, blacks are significantly less intelligent than whites. . . .
>
> The significance of these findings for our profession (as for the rest of society) is that black representation in a field can be expected, absent any discrimination, to decrease as the intellectual demands of the field increase.

Levin, 770 F. Supp. at 902-03.

[55] Dean Paul Sherwin sent a letter to Professor Levin's students that said, in part:

> You may know—and otherwise, I expect would soon learn from sources other than this letter—that Professor Levin has expressed controversial views on such issues as race, feminism and homosexuality. . . . I should add that I am aware of no evidence suggesting that Professor Levin's views on controversial matters have compromised his performance as an able teacher of Philosophy who is fair in his treatment of students. Taking into consideration the rights and sensitivities of all concerned, and wishing to permit informed freedom of choice for students . . . I have in this instance decided to open a second [section].

Id. at 908 (alteration in original).

[56] Levin v. Harleston, 966 F.2d 85, 88 (2d Cir. 1992) (citations omitted).

Van Alstyne has noted that academics benefit from "exceptional vocational freedom,"[60] and must therefore pay "the cost of exceptional care in the representation of [the truth as they view it], a professional standard of care."[61] As a result, academics who engage in careless teaching or make major misrepresentations in disseminating ideas may be entitled to less protection than those who teach controversial topics within their area of expertise.[62]

In a nutshell, expression of controversial ideas and criticism of the status quo must be protected, even at the risk of discomfort for the teacher or class, when a professor is teaching within her field. Accordingly, a graduate student who wished to discuss men's and women's spatial-reasoning skills in a class he was teaching on "comparative animal behavior" but who feared prosecution under the university's hate speech code, convinced a federal court that the code endangered his First Amendment rights.[63] But academics still must adhere to professional standards in voicing their views.

This "professorial function" approach protects classroom utterances so long as they meet professional standards and result from training, developed expertise, and scrupulous care in presenting material. Conversely, a mathematician who insisted that 2+2=5 could be fired for failing to meet professional measures of competence; an English teacher, police file clerk, or telephone operator, though, could not be fired for holding such a belief.[64] While the calculus grows more complex for interdisciplinary fields, peer-review journals and tenure committees routinely invoke the professional standard of care.[65] Professional standards are, in short, common in academic practice.

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[57] VAN ALSTYNE, *supra* note 11, at 77.

[58] 482 U.S. 578, 593 (1987).

[59] While Levin used philosophical sources in his writings, he al[illegible] used psychometric and statistical "evidence." *See Levin*, 770 F. Supp. at 901-03 (noting that Levin reviewed I.Q. data on blacks and whites in his writings).

[60] VAN ALSTYNE, *supra* note 11, at 76.

[61] *Id.*

[62] For example, in Pickering v. Board of Education, 391 U.S. 463 (1968), the Court extended broad protection to speak out on matters of public importance outside the classroom (in this case, a letter to the editor that was critical of the Board of Education).

[63] Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).

A necessary corollary, however, is that a heightened core of professional protection need not translate into more protection for "intramural utterances" (nonprofessorial speech) than nonacademics receive. Thus, a philosophy professor who writes a pornographic novel,[66] or a university president who makes an obscene and harassing phone call from campus,[67] should not be able to claim any more or less protection than any member of the community. To broaden protection of such intramural speech, a more principled path is to exceed *Connick* and expand everyone's political speech rights, rather than concocting an overbroad conception of academic freedom. Faculty should be entitled to special consideration only in pursuing academic endeavors (hence "academic" freedom), such as in the classroom. Extending the protections of academic freedom to extra-academic speech, in this light, is unprincipled.

There should therefore be a permeable border between professorial speech and nonprofessorial speech. Professor David Rabban argues for a similar approach; in distinguishing between academic freedom and the general free speech clause, he urges:

> The distinctive professional functions of professors provide the basis for applying a special first amendment concept to them. But what is the first amendment justification for treating the aprofessional speech of professors differently from the speech of anyone else?
>
> The only plausible justification is that the line between professional and

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[64] MIT philosophy professor Judith Thompson makes a similar point concerning belief systems in faculty hiring. In an interesting essay on the appropriate norms for considering scholarly orthodoxies, she considers the candidacy of an astrology expert and rejects the field of study as not sufficiently scientific:

> As a member of the committee, I was under a duty precisely to bring my past experience to bear on, among other questions, the question what fields are worth investing in. Given my past experience, I would have failed in that duty if I had refrained from voting against astrology.

Judith Jarvis Thompson, *Ideology and Faculty Selection*, LAW & CONTEMP. PROBS., Summer 1990, at 155, 160.

[65] It might be possible for a genuinely original and brilliant scholar to assert that he or she is effectively unreviewable, but this argument is highly unlikely to prevail in a university setting. Such a claim was rejected tangentially in Kay v. Board of Higher Education, 173 Misc. 943, 18 N.Y.S.2d 821 (N.Y. Sup. Ct. 1940), which held that the philosopher Bertrand Russell should not be appointed to a mathematics post at the City College of New York because his views amounted to advocating violation of the state's penal code: "His appointment violates a perfectly obvious canon of pedagogy, namely, that the personality of the teacher has more to do with forming a student's opinion than many syllogisms. . . . It is contended that Bertrand Russell is extraordinary. That makes him the more dangerous." *Id.* at 829.

[66] Katherine S. Mangan, *Texas Professor Who Wrote Erotic Novel Is Accused of Harassment*, CHRON. HIGHER EDUC., Feb. 17, 1993, at A14.

[67] The president of American University, Richard Berendzen, installed a private phone in his desk from which he made harrassing and obscene phone calls to women. *See* Neil Lewis, *University Chief's Ouster Is Tied to Investigation of Obscene Calls*, N.Y. TIMES, Apr. 25, 1990, at A19.

> aprofessional speech may be controversial, and that protection for clearly aprofessional speech is needed to give "breathing room" to the professional speech that is the special subject of academic freedom. Such a drastic prophylactic rule is unnecessary and would be likely to generate more resentment against the "special pleading" of professors than even a narrow and convincing conception of academic freedom inevitably does. A generous definition of professional speech is a feasible and better response to this legitimate concern.
>
> There are legitimate first amendment reasons for protecting the political speech of public employees generally. Indeed, the Supreme Court has done so while rejecting the "right/privilege" distinction popularized by Holmes. But as the Supreme Court has recognized, it is the free speech clause, not the special first amendment right of academic freedom, that provides the constitutional basis for this protection.[68]

Under Rabban's attractive approach, courts would produce a "coherent and convincing specific conception of constitutional academic freedom,"[69] specifically acknowledging professional speech by teachers and distinguishing it from other protected speech. This theory harmonizes well with the approach I advocate, where core professorial speech is broadly protected, although still subject to norms of professional practice.

Even if a more fully articulated professorial speech theory were to be accepted by the courts, difficulty might arise in accomodating students' rights in cases in which a professor arguably exceeds professorial authority in classroom instruction. It is to this narrow issue I turn, as the small number of cases in this area directly challenge the broad protection of truly professorial speech advocated above. I conclude that students should have breathing room to bring grievances when their rights as learners have been violated, but only when professorial speech is well wide of the mark, such as speech in the context of classroom instruction that is judged by peers as undeserving of protection.

IV. CONSIDERING STUDENT RIGHTS

Max Lynch taught mathematics at Indiana State University and read aloud from the Bible at the beginning of each class period.[70] Following complaints, the University ordered him to desist. When he refused, the University held a dismissal proceeding to determine his continued employment, after which Professor Lynch was dismissed.[71]

The trial court found that Lynch's practice of allowing students to stand outside class until the prayers were over did not sufficiently preserve the students' rights. The appeals court similarly held:

> For the students in his mathematics classes, the indisputable effect of

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[68] Rabban, *supra* note 3, at 244 (footnote omitted).

[69] *Id.* at 246.

[70] Lynch v. Indiana State Univ. Bd. of Trustees, 177 Ind. App. 172, 378 N.E.2d 900 (Ct. App. 1978), *cert. denied*, 441 U.S. 946 (1979).

[71] *Id.* at 901-02.

> Lynch's Bible reading was the advancement or promotion of Lynch's particular religious views and practices. Peer pressure, fear of the teacher, concerns about grades, and the alternative of standing outside the classroom in the hall, severely limit the freedom of a student to absent himself from class during a Bible reading.[72]

The court easily found that the Establishment Clause required the University to discontinue Lynch's practice.[73]

Lynch is a relatively easy case. Not as easy is *Bishop v. Aronov*,[74] in which an exercise physiology professor expressed his religious beliefs to his class, invited students to point out deviations in his lifestyle from tenets of Christianity, and offered extra class sessions during which he explained his philosophy, linking Christianity and physiology. The sessions were optional and the course examination was graded blindly.[75] When students complained about his injecting religious beliefs into the exercise physiology course, University of Alabama officials warned him to discontinue the practice. He sued on the grounds that his academic freedom and free speech rights had been infringed.[76] Professor Bishop prevailed in the district court, which found that he could "divulge personal views in the classroom as long as they are not disruptive of classroom activities."[77] The court further found the University to be discriminatory in specifically proscribing only Christian perspectives in the classroom.[78]

The appeals court disagreed, in a decision that may have been the right result for the wrong reasons.[79] Drawing on the *Hazelwood School District v. Kuhlmeier* student newspaper case,[80] an unfortunate K-12 decision that has inexorably crept into higher education, the Eleventh Circuit held that a university may exercise broad authority over faculty, and that even in a classroom, "a teacher's speech can be taken as directly and deliberately representative of the school."[81] This holding exceeds by a wide margin the rationale necessary to find for the University. The court could have fashioned a more carefully reasoned argument, based on higher education precedents, that religion is *sui generis*, that supplementary lectures and personal remarks on religious beliefs are highly suggestive, that religious views are not germane to an exercise physiology (or math) class, and that a faculty committee had reviewed the matter and given Bishop the opportunity to explain his pedagogical choices.[82] The overbroad reasoning in *Bishop* led AAUP counsel Ann Franke to characterize the case as "substantially erod[ing] the legal underpinnings of faculty free speech."[83] Even so, the AAUP chose not to urge an appeal for Supreme Court review.[84]

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[72] *Id.* at 903.

[73] *Id.* at 908.

[74] 732 F. Supp. 1562 (N.D. Ala. 1990), *rev'd*, 926 F.2d 1066 (11th Cir. 1991), *and cert. denied sub nom.*, Bishop v. Delchamps, 112 S. Ct. 3026 (1992).

[75] *Id.* at 1564.

[76] *Id.* at 1565.

[77] *Id.* at 1566.

[78] *Id.* at 1568.

[79] Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991).

[80] 484 U.S. 260 (1988).

[81] *Bishop*, 926 F.2d at 1073.

[82] *See* Ann H. Franke, *Religious Speech in the Classroom*, ACADEME, Nov.-Dec. 1991, at 64.

Religious proselytizing cases such as *Lynch* and *Bishop* may not be the best examples on which to base a theory of professorial rights or student rights, because Establishment Clause jurisprudence will almost inevitably take precedence over a teacher's putative rights to discuss religious beliefs in nonreligion courses. Professors Lynch and Bishop would likely have been entitled to more latitude if they had been divinity scholars teaching a comparative religion seminar or an epistemology course.[85] *Cooper v. Ross* provides a secular example,[86] in which a Marxist professor announced his beliefs and indicated that they guided his teaching, but did not insist that students agree with his philosophy. The University denied him reappointment because of his beliefs, and the professor sued. The court ruled for the professor on the narrow basis that the University's reasons were pretextual, and thereby avoided the larger issue of whether the University could "prohibit teaching from a Marxist point of view."[87]

In *Carley v. Arizona Board of Regents*,[88] the pedagogical issue surrounded Professor Denny Carley's insistence that his art students perform their work independently and without supervision.[89] He attempted to instill this sense of student independence by regularly leaving classes and studio sessions unsupervised. When many students complained and gave him poor teaching evaluations, a faculty committee voted not to retain him. After several administrative levels of review, the Northern Arizona University president concurred in the committee decision. Professor Carley sued, claiming that his teaching methodology was protected speech and that it was improper to use student evaluations in faculty review. The court disagreed, concluding that "the decision not to retain Carley, even if based, in part, upon student evaluations expressing disapproval of his teaching methods, did not violate his first amendment rights."[90]

It is not clear what criteria Professor Carley would have an institution use to evaluate teaching competence. A faculty committee reviewed his classes, his submitted teaching materials, and the student evaluations. This procedure, in one form or another, is the universally employed model, followed by virtually all such review committees.[91] Many faculty would be skeptical of a teaching record that includes regularly leaving classes unsupervised, even if the practice were grounded in genuine pedagogical principles. Most would consider this an abdication of teaching responsibilities rather than a protected form of professorial speech.

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[83] *Id.*

[84] *Id.; see also* Robert M. O'Neil, Bishop v. Aronov: *A Comment*, 18 J.C. & U.L. 381 (1992).

[85] *See* O'Neil, *supra* note 84. Another recent case would seem to fit this pattern of exceeding appropriate norms, where a teacher of social work showed an anti-abortion film before a final exam in her human behavior course. *Professor Shows Film of Aborted Fetuses*, CHRON. HIGHER EDUC., May 19, 1993, at A4.

[86] 472 F. Supp. 802 (E.D. Ark. 1979).

[87] *Id.* at 814.

[88] 153 Ariz. 461, 737 P.2d 1099 (1987).

[89] *Id.* at 1101.

[90] *Id.* at 1103.

[91] There is a vast literature on student and peer evaluation of teachers. *See, e.g.*, Laura Goodwin & Ellen Stevens, *The Influence of Gender on University Faculty Members' Perceptions of 'Good' Teaching*, 64 J. HIGHER EDUC. 166 (1993); Ronald Smith & Patricia Cranton, *Students' Perceptions*

Martin v. Parrish presents a more recognizable claim.[92] In *Martin*, an economics instructor, exasperated by his students' unsatisfactory class participation, cursed them in no uncertain terms. Students complained that he had regularly excoriated them in class, with statements such as " 'the attitude of the class sucks,' '[the attitude] is a bunch of bullshit,' 'you may think economics is a bunch of bullshit,' and, 'if you don't like the way I teach this God damn course there is the door.' "[93] Even after being warned by the administration to discontinue such behavior, Professor Martin continued to curse in class. Following a series of administrative hearings, he was terminated.

The court placed his dismissal squarely in the *Connick* stream, and found that the epithets were not a matter of public concern: Martin "has not argued that his profanity was for any purpose other than cussing out his students as an expression of frustration with their progress—to 'motivate' them—and has thereby impliedly conceded his case under *Connick*."[94] The court dismissed his academic freedom claim with a footnote:

> Appellant also argues vigorously that he has a first amendment right to "academic freedom" that permits use of the language in question. It is, however, undisputed that such language was not germane to the subject matters in his class and had no educational function. Thus, . . . we find it unnecessary to reach this issue.[95]

One need not be a prude to object to Professor Martin's classroom manner, especially considering that his intimidating tactics continued after numerous student complaints. Notwithstanding the Professor Kingsfields of the world,[96] general invectives, hostile language, and teaching-by-terror have virtually no place as a regular teaching methodology in a classroom, except conceivably in a trial tactics or simulation course when used to demonstrate which rules of evidence would cover such outbursts, or some other such highly stylized purpose. The Fifth Circuit found that Professor Martin's tactics would be inappropriate behavior for trial attorneys and elected officials, suggesting that the speech would not be protected even outside professorial responsibilities.[97]

The record does not reveal that students in Professor Martin's class ob-

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of Teaching Skills and Overall Effectiveness Across Instructional Settings, 33 RES. IN HIGHER EDUC. 747 (1992).

[92] 805 F.2d 583 (5th Cir. 1986).

[93] *Id.* at 584 (alteration in original).

[94] *Id.* at 585.

[95] *Id.* at 584 n.2 (citation omitted).

[96] JOHN JAY OSBORN, JR., THE PAPER CHASE (1971). For a sampling of the commentary on the legendary, intimidating Harvard contracts professor Kingsfield, see Arthur D. Austin, *The Waste Land of Law School Fiction*, 1989 DUKE L.J. 495 (book review).

[97] *Martin*, 805 F.2d at 586. As an example of changing norms, a college basketball coach was

jected directly to him. However, in *McConnell v. Howard University*,[98] a black student in Professor McConnell's math course objected to McConnell's attempt to encourage students to study harder by telling them a tale involving a monkey who did not concentrate upon its task.[99] When the student called him a " 'condescending, patronizing racist,' "[100] Professor McConnell demanded an apology and banned her from his course. The student was told by a Howard University administrator that her conduct was not appropriate and that she would be disciplined if she did not cooperate in class.[101] When she would not apologize, Professor McConnell refused to continue teaching until the administration removed the student from his math course.[102] After rejecting an order to return to his class, Professor McConnell was terminated by the Board of Trustees, even though a faculty committee had found " 'mitigating circumstances . . . such that termination was not warranted.' "[103] The committee considered the incident " 'within a broader context of professorial authority interest in the teacher-student relationship,' and [found] that '[a] teacher has the right to expect the University to protect the professional authority in teacher-student relationships.' "[104]

The trial court had dismissed McConnell's breach of contract claim on summary judgment,[105] but Circuit Judge Harry T. Edwards vacated the trial judgment,[106] and remanded for a determination of the "contract obligations in light of all the surrounding facts and circumstances and the *prevailing professional norms*."[107] At the subsequent jury trial, McConnell lost his action.[108] As in several cases discussed earlier, race appears to have played a subtle role in *McConnell*.[109]

In another case involving an historically black college, angry epithets and boorish behavior were not limited to faculty. In *Parate v. Isibor*,[110] the Sixth Circuit found that even an administrator's "unprofessional" conduct

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dismissed for repeatedly berating his athletes. Debra E. Blum, *Abrupt Dismissal of Berkeley's Coach Stuns the College Basketball World*, Chron. Higher Educ., Feb. 24, 1993, at A35.

[98] 818 F.2d 58 (D.C. Cir. 1987).

[99] *Id.* at 60.

[100] *Id.*

[101] *Id.* at 60-61.

[102] *Id.*

[103] *Id.* (quoting the report of the faculty committee).

[104] *Id.* (citation omitted) (second alteration in original).

[105] McConnell v. Howard Univ., 621 F. Supp. 327 (D.D.C. 1985), *vacated*, 818 F.2d 58 (D.C. Cir. 1987).

[106] *McConnell*, 818 F.2d at 58. Judge Edwards, a former law professor at the University of Michigan and Harvard University, is an acknowledged expert in higher education law and labor law. *See* Harry T. Edwards & Virginia Davis Nordin, Higher Education and the Law (1979).

[107] 818 F.2d at 71 (emphasis added).

[108] McConnell v. Howard Univ., Civ. A. No. 85-0298-LFO, 1988 WL 4237 (D.D.C. Jan. 5, 1988).

[109] McConnell, an Anglo, used a folk tale with a monkey as its central character. The student took the monkey to be a prejorative racial reference. Suggesting that African American students are "monkeys" may be understood as an unfortunate racial reference, one even more likely to be recognized as offensive in an institution with the racial character of Howard.

[110] 868 F.2d 821 (6th Cir. 1989).

in berating a professor in his classroom did not constitute a violation of the professor's First Amendment rights. Considering the extraordinary facts underlying *Parate*, it is unlikely that any administrative interference with a professor's teaching methodology will ever be found to violate the First Amendment. A dispute over an order by the Dean to Professor Parate to change a particular student's grade precipitated the following remarkable sequence of events. Because of their extreme nature, the facts are recounted here in some detail.

In response to the grading dispute, the Dean of Tennessee State University, Dean Isibor, and Department Chair Samuchin "engaged in a variety of retaliatory acts against Parate."[111] These included giving poor performance evaluations, refusing to authorize expenditure reimbursements, directly challenging Professor Parate's grading criteria in other courses, and ultimately, recommending nonrenewal of his teaching contract.[112] Students, taking note of the administration's unfavorable treatment of Parate, began demanding that Parate change their grades, and threatened to go to Dean Isibor if their demands were not satisfied. The students also "questioned Parate's teaching competence in front of his other students,"[113] and "stated that they would insure that Parate would not teach . . . in following semesters."[114]

Subsequently, Isibor and Samuchin entered one of Parate's classes unannounced, and proceeded repeatedly to disrupt his teaching. They continually questioned his methods in front of the students, and interrupted his presentation with instructions on how to proceed with the class. Finally, Isibor himself went to the front of the class to work on a problem that Parate and his students were studying. Later, Isibor collected the students' papers and left. At a meeting following this incident, Isibor "removed Parate from his post as instructor . . . , but directed Parate to attend the class as a student."[115] Parate was never reinstated, and faculty observers were continually assigned to monitor his classrooms.

Parate encompassed two central issues: 1) the fairness of the University's evaluation and dismissal of Parate; and 2) the scope of Parate's right to award grades in the face of university demands to change them. With respect to the first issue, most readers would presumably believe that the chair and dean had exceeded any bounds of fair and impartial evaluation in light of the extraordinary events which transpired. In accordance, the court found the administrators' behavior to be "unprofessional."[116] However, it ultimately held that Parate had "failed to prove that the defendants' conduct . . . was so severe, so disproportionate to the need presented, and such an abuse of authority"[117] as to constitute a deprivation of Parate's substantive due process rights. The court found that the bizarre classroom incident cast no " 'pall of orthodoxy' "[118] over the class, and determined that the TSU administrators were "free to observe, review or evaluate [faculty teaching]."[119]

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[111] *Id.* at 824.
[112] *Id.* at 824-25.
[113] *Id.* at 825.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 833.
[117] *Id.*

The court also reviewed the grading incident that appears to have precipitated the conflict, and in convincing language, found that Parate's First Amendment right to post grades had been violated:

> We believe that the acts of the defendants deserve *exacting* First Amendment scrutiny. First, we consider Parate's First Amendment right to academic freedom and his interest in eliminating the defendants' arbitrary interference in the assignment of his course grades. Second, we consider Parate's First Amendment right to be free from compelled speech. By insisting that Parate sign the grade change memoranda without including his reservations or the notation "per the instruction of the Dean," the defendants compelled Parate to conform to a belief and a communication to which he did not subscribe. We then balance Parate's interests against defendants' interest in having Parate personally change Student "Y's" grade. Arguing from their First Amendment right to academic freedom, the defendants assert an interest in supervising and reviewing the grading policies of their nontenured professors. If they deemed Parate's grade assignments improper, however, the defendants could have achieved their goals by administratively changing Student "Y's" grade. We conclude that by forcing Parate to change, against his professional judgment, Student "Y's" grade, the defendants unconstitutionally compelled Parate's speech and chose a means to accomplish their supervisory goals that was unduly burdensome and constitutionally infirm.[120]

The *Parate* court followed *Hillis v. Stephen F. Austin State University,*[121] *Lovelace v. Southeastern Massachusetts University,*[122] and *Hetrick v. Martin,*[123] which involved grading standards and the broad right of colleges to review teaching practices. However, the *Parate* opinion extended considerable deference to professorial academic freedom in the awarding of grades. Before *Parate*, even when there existed some evidence that professors used inconsistent grading standards or misstated their grading practices,[124] or when a medical school advertised that students failing their exams could retake them and then did not allow a failing student to do so,[125] colleges won their cases against students. There is no reported case in which a student has effectively overturned a grade.[126] However, *Parate*'s strong endorsement of professional discretion to award grades would seem to constitute the necessary predicate to overturn his dismissal in the teaching evaluation fiasco. The pattern of unprofessional administrative harassment clearly flowed from the original grading dispute itself. Furthermore, Parate's students understood the connection between his grading practices and his fall from favor: Students began to demand reconsideration of their grades, and threatened to go to Dean Isibor if Professor Parate would not change their grades.[127] The court could readily have found the necessary nexus between the protected grading activity and Parate's harassment, and given a principled slap on the wrist to unprofessional and unscrupulous administrators while preserving the plenary right of colleges reasonably to review teaching competence through acceptable peer review or other traditional evaluative instruments. However, the court chose to consider separately the grading discretion and faculty evaluation issues.

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[118] *Id.* at 831.

[119] *Id.* at 830 (citation omitted).

[120] *Id.*

[121] 665 F.2d 547 (5th Cir. 1982), *cited in Parate,* 868 F.2d at 829.

[122] 793 F.2d 419 (1st Cir. 1986), *cited in Parate,* 868 F.2d at 829.

[123] 480 F.2d 705 (6th Cir.), *cert. denied,* 414 U.S. 1075 (1973), *cited in Parate,* 868 F.2d at 830.

[124] *See* Olsson v. Board of Higher Educ., 49 N.Y.2d 408, 402 N.E.2d 1150, 426 N.Y.S.2d 248 (1980) (upholding student's grade despite the fact that the student failed an exam because he relied on his professor's misstatement regarding how the exam would be graded); Susan M. v. New York Law Sch., 76 N.Y.2d 241, 556 N.E.2d 1104, 557 N.Y.S.2d 297 (1990) (court refusing to intervene on behalf of a student who received a poor grade allegedly because she analyzed a problem under both Delaware and New York law when only Delaware law was called for in the question); *see also* Harold Weinberger & Andrew Shepard, *Judicial Review of Academic Student Evaluations: A Comment on* Susan "M." v. New York Law School *from Those Who Litigated It*, 77 EDUC. L. RPTR. 1089 (1992). *See generally* Thomas A. Schweitzer, *"Academic Challenge" Cases: Should Judicial*

V. PERSONAL OBSERVATIONS ON CLASSROOM CONFLICTS

I began this project believing that an analysis of higher education case law would yield a relatively clear "academic common law" that outlined acceptable classroom practice, and that courts carefully balanced the interests of teachers, institutions, and students. I thought, for example, I would find that courts were increasingly willing to evaluate student challenges to faculty grading practices,[128] evincing an increased judicial willingness to define the boundaries of proper classroom conduct. At my own law school, a state district judge, facing a racial challenge to a professor's grading practices, had insisted upon reviewing examination books and redacted examination answer sheets.[129] Although the professor was ultimately exonerated, it

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Review Extend to Academic Evaluations of Students, 41 AM. U. L. REV. 267 (1992) (reviewing and analyzing grading and academic dismissal cases).

[125] *See* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985).

[126] *But cf.* Keen v. Penson, 970 F.2d 252, 255 (7th Cir. 1992) (upholding against professor's academic freedom claim the university's order to change a student's grade, because evidence indicated that student's failing grade was not fair, and was instead a product of the student's prolonged and bizarre dispute with her professor).

[127] *Parate*, 868 F.2d at 825.

[128] *See* Ochsner v. Board of Trustees, 811 P.2d 985, 988 (Wyo. 1991) (indicating that "court[s] [may] review whether the procedures used by . . . college[s] in determining . . . grade[s] are fair"); Bergstrom v. Buettner, 697 F. Supp. 1098, 1102 (D.N.D. 1987) (finding issue of material fact regarding whether medical school's grading criteria were arbitrary, and denying school's summary judgment motion on this issue).

[129] Clarence Jackson v. University of Houston, Civ. 87-11559 (157th Judicial District, Harris County, Texas), *dismissed for want of prosecution*, May, 1991. In this case, a University of Houston law student charged that multiple-choice examinations were not evaluated blindly, but with knowledge of students' race. The judge required the University of Houston to provide actual exams, bubble-sheet answer forms, and grading patterns for the classes in question. These exhibits were reviewed *in camera*. Before the judge reached a ruling, the plaintiff withdrew his charges. Interview with University of Houston Counsel (Apr. 1993).

was the first time in my experience that a judge had evaluated a professor's conduct by actually reviewing exams. I have also been involved in a case in which my client was falsely accused of cheating on a medical school exam; we successfully challenged his expulsion by showing that the hearing process was prejudicial and that the medical school did not adhere to its own procedures.[130] These experiences, as well as recent legal developments that require institutions to accommodate persons with physical and learning disabilities—even to the extent of modifying class[131] and exam formats,[132] led me to believe that a modest revolution was occurring. Several highly publicized incidents between students and professors, where students accused their teachers of engaging in sexist, homophobic, or racist practices,[133] also prompted me to suppose that the traditional deference given to colleges as against students was beginning to erode. Hence my "Second Thoughts" on the subject.

Nonetheless, more careful study of recent cases, especially *Levin v. Harleston*[134] and *Parate v. Isibor,*[135] indicates otherwise. *Levin* in particular gives me pause. Although I believe it was correctly decided, the court's assumption that because students had not raised objections to Professor Levin's published views on racial differences, they were unaffected by them, is troubling. It may be technically true that students had not insisted upon the shadow sections, but it is not correct that students were unaffected by his views. Indeed, after the president drew public attention to Levin's controversial views, there were regular and vocal student demonstrations and disruptions of his class.[136] Furthermore, I met and spoke with two of Levin's former students, one African American and the other Puerto Rican, who are now both law students. When I discovered they had been City College students, I asked them if they had been in Levin's Philosophy 101 class; both had, although the black student had opted to take the alternative shadow section after discovering from other students what Levin's views on racial heritability were. The Puerto Rican student had not availed herself of this alternative, as she had already bought the book and was ready to take the course by the time the other section was organized. She said she regretted not having made the switch, as she felt that Professor Levin's views made her feel unwelcome in class. Although he never made disparaging remarks or was discourteous, she believed he considered her uneducable and inferior to white students. She strongly believed that he favored white students in class and that he more sharply questioned students of color.[137]

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[130] University of Tex. Medical Sch. v. Than, 834 S.W.2d 425 (Tex. Ct. App. 1992).

[131] *See* 34 C.F.R. § 104.44 (1992). *See generally* Brigid Hurley, *Accommodating Learning Disabled Students in Higher Education: Schools' Legal Obligations Under Section 504 of the Rehabilitation Act,* 32 B.C. L. REV. 1051, 1059-60 (1991); Laura F. Rothstein, *Students, Staff and Faculty with Disabilities: Current Issues for Colleges and Universities,* 17 J.C. & U.L. 471 (1991).

[132] In one case, for example, a medical school made a number of accommodations—including make-up tests—for a student diagnosed as having cognitive deficits and weaknesses in processing discrete units of information. Wynne v. Tufts Univ. Sch. of Medicine, 976 F.2d 791 (1st Cir. 1992). When these did not suffice to enable the student to pass all his courses, he sued to have the multiple choice examination format declared discriminatory. The First Circuit held that the school had made substantial alterations to their usual pedagogical practices, and that it was not required to provide fundamentally different exam formats. *Id.*

[133] *See, e.g.*, McConnell v. Howard Univ., 621 F. Supp. 327, 328 (D.D.C. 1985), *vacated,* 818 F.2d 58 (D.C. Cir. 1987). In another incident, a Texas A&M University police academy instructor was cleared of sexual harassment charges that stemmed from his requiring a female student to blow into a breathalyzer tube attached to an artificial penis, and his showing pictures of topless women in class slide shows. Mark Smith, *Instructor's Joke Not Misconduct,* HOUS. CHRON., Jan. 17, 1993, at 1D. Additional examples include an art professor who was found by a Vanderbilt University investigation to have created a sexually hostile academic environment for students by using photographs by Robert Mapplethorpe and nude photos of himself in class, and a tenured University of Wisconsin professor who was fired for harassing students and having sex with some of them in his office. Courtney Leatherman, *Faculty Notes: Vanderbilt U. May Punish Art Professor over Class Presentation, U. of Wis. Fires Tenured Professor Accused of Improprieties,* CHRON. HIGHER EDUC., Feb. 24, 1993, at A18. Another example concerns a visiting professor at Harvard Law School, who was accused by some students of using demeaning and sexist examples even after students had raised complaints. *See* Richard Bernstein, *On Campus, How Free Should Free Speech Be?,* N.Y. TIMES, Sept. 10, 1989, at 4. I list these only as examples of the controversies, not for any analytic purposes.

[134] 770 F. Supp. 895 (S.D.N.Y. 1991), *aff'd in part, vacated in part,* 966 F.2d 85 (2d Cir. 1992); *see* text accompanying notes 53-56 *supra.*

[135] 868 F.2d 821 (6th Cir. 1989); *see* text accompanying notes 110-127 *supra.*

The students' remarks reminded me of an incident which occurred during my first year of law school. In one of my classes, I felt that a professor had made several unfortunate remarks (having to do with "Indian givers" and the class resembling the United Nations). After class, I went to speak to him privately, where he was very resistant to my feelings on the matter; he said, in rebuttal, that Richard Pryor had made an album with the word "Nigger" in the title,[138] and that I was being too sensitive. Moreover, he raised a type of "standing" defense, inasmuch as I was not Native American. I left, but made sure I was prepared for that course. It was a good thing, as he began the next class by apologizing for any insensitive remarks, and by calling upon me four straight times, including one case that called for a Spanish-to-English translation.

VI. CONCLUSION: THE KALEIDOSCOPE OF CLASSROOM CONFLICTS

Having reviewed the variety of available paradigms and metaphors concerning academic freedom, I now adopt my own, that of the kaleidoscope, the wonderful child's toy that—with a turn—reconstitutes one mosaic into another while using the same shards of glass and refracted light. How one characterizes classroom interactions is akin to turning a kaleidoscope in the light: From one perspective it is a professor's autonomy to teach how she sees fit; from another it is a student's right to learn in an environment free of harassing behavior; from yet another it is the Dean's duty to ensure that appropriate instruction is taking place; and finally, it may be the accrediting agency's responsibility to maintain uniform standards across institutions. Rotating the toy counterclockwise can produce a bullying or insensitive professor, a hypersensitive or grade-grubbing student, a high-handed or inattentive dean, an interfering legislature, or even an outsider with some political axe to grind. Any incident that arises from a teaching situation can resemble the shards that refract light differently: When a student complains about a teacher's style or approach to an institutional authority, is this an institutional autonomy matter, a student's well-pleaded harassment grievance, or a faculty member's traditional prerogative? To pick one characterization is effectively to choose one scenario over the others, and to color the answer. The selection is made even more difficult if the respective parties are acting in reasonable good faith, not simply calculating to get a better grade by blackmailing the professor as appeared to have been the case in *Parate.*[139] Professor Shockley's interlopers, meanwhile, could not plausibly advance a good faith exception to justify their examination interruption.[140] On the other hand, it is almost inconceivable that Dean Isibor's actions could be interpreted as necessary or professional.[141]

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[136] *Levin*, 770 F. Supp. at 903.

[137] I promised these students confidentiality, and that I would only summarize their conversations. The conversations took place at a talk I gave at the Association of the City Bar of New York. For a summary of the evening's program, see Michael A. Olivas, *Introduction*, 63 J. HIGHER EDUC. 479 (1992).

[138] RICHARD PRYOR, BICENTENNIAL NIGGER (Reprise Records, 1976). Since that time, the comedian has sworn off his use of the term, conceding that it is offensive and degrading. Micheal Marriot, *Rap's Embrace of "Nigger" Fires Bitter Debate*, N.Y. TIMES, Jan. 24, 1993, at A1, A31 (stating that after a trip to Africa, Mr. Pryor told audiences he would never again use the word "nigger").

A proper configuration of professorial academic freedom is one that is normative and resilient enough to resist extremes from without or within, to fend off the New Hampshire legislative inquiry of *Sweezy*[142] and the proselytizing of *Bishop.*[143] In this view, professors have wide ranging discretion to undertake their research and to formulate teaching methods in their classrooms and laboratories. However, this autonomy is, within broad limits, highly contingent upon traditional norms of peer review, codes of ethical behavior, and institutional standards. In the most favorable circumstances, these norms will be faculty-driven, subject to administrative guidelines for ensuring requisite due process and fairness. Even the highly optimistic and altruistic 1915 AAUP Declaration of Principles does not hold that "individual teachers should be exempt from all restraints as to the matter or manner of their utterances, either within or without the university."[144] In short, academic freedom does not give *carte blanche* to professors, but rather vests faculty with establishing and enforcing standards of behavior to be reasonably and appropriately applied in evaluations.

The higher education system works exceedingly well given the thousands of diverse institutional settings, the hundreds of thousands of teachers, and the tens of millions of students engaged in coursework on a regular basis. Even so, the raised stakes which stem from increasing tuition and a stagnant economy, coupled with an increasing tendency to legalize disputes in the academy,[145] have led to an increasing number of cases involving the third dimension of academic freedom, "how classes shall be taught." This trend towards greater legal involvement in classroom affairs is not likely to wane, as the increased reliance upon faculty assessment, concerns over excessive workloads, and the uncapping of mandatory retirement,[146] all promise greater student demands and increased administrative oversight of traditional faculty activities.

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[139] Parate v. Isibor, 868 F.2d 821, 824 (6th Cir. 1989)

[140] Furumoto v. Lyman, 362 F. Supp. 1267, 1282 (N.D. Cal. 1973).

[141] *Parate*, 868 F.2d at 833.

[142] Sweezy v. New Hampshire, 354 U.S. 234 (1957).

[143] Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991).

[144] *General Report (1915), supra* note 13, at 293.

My discussions with Professor Levin's students and my own experiences as a student and professor lead me to believe that any comprehensive theory of professorial authority to determine "how it shall be taught" must incorporate a feedback mechanism for students to take issue, voice complaints, and point out remarks or attitudes that may be insensitive or disparaging. At a minimum, faculty should encourage students to speak privately with them to identify uncomfortable situations. Professor Bishop asked his students to point out inconsistencies between his Christian perspectives and his lifestyle.[147] This is excessive, and could itself provoke anxiety on the part of both Christian and non-Christian students. But a modest attempt to avoid stigmatizing words and examples is certainly in order for teachers, and schools should have in place some mechanism to address these issues and resolve problems. I cringe when I see exam questions that consign Jose, Maria, or Rufus to criminal questions, or when in-class hypotheticals use "illegal aliens" or sexist examples and stereotypes to illustrate important legal points. Such misuse may be especially prevalent in fact patterns involving rape and consent.[148] Our students have a right to expect more thoughtful pedagogical practices.[149]

I can imagine colleagues wincing at the perceived political correctness axe being ground and uttering dismissive remarks concerning self-censoring.

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[145] Michael A. Olivas & Kathleen McCartan Denison, *Legalization in the Academy: Higher Education and the Supreme Court*, 11 J.C. & U.L. 1 (1984) (reviewing higher education cases in 1982-83 Supreme Court term).

[146] Michael A. Olivas, *Uncapping Mandatory Retirement for Faculty: A Concurring and Dissenting Opinion*, Address at TIAA-CREF Legislative Benefit Issues Symposium (May 4, 1993) (on file with the *Stanford Law Review*).

[147] Bishop v. Aronov, 732 F. Supp. 1562 (N.D. Ala. 1990), *rev'd* 926 F.2d 1066 (11th Cir.), *cert. denied*, 112 S. Ct. 3026 (1992); *see* text accompanying notes 74-84 *supra*.

[148] *See* James J. Tomkovicz, *On Teaching Rape: Reasons, Risks, and Rewards*, 102 YALE L.J. 481 (1992) (explaining the difficulty of teaching rape law); *see also* Clarence Page, *Where Narrow Minds Stifle Debate*, CHIC. TRIB., Dec. 23, 1990, at 3C (citing incident in which New York University Law School withdrew—and later reinstated—a moot court problem involving a lesbian mother's custody battle because students did not want to take the father's side in the case). A new pretrial discovery text includes an entire chapter that constitutes a case-study of a woman convicted of petty theft being processed into jail for an outstanding parole violation. THEODORE BLUMOFF, MARGARET JOHNS & EDWARD IMWINKELRIED, PRETRIAL DISCOVERY: THE DEVELOPMENT OF PROFESSIONAL JUDGMENT (1993). There is a graphic scenario involving a strip search, Taser guns, leering guards, and a miscarriage from the Taser shocks. The name of the criminal, the only recognizably-ethnic name in evidence, is "Maria Garcia."

[149] The Education Department's newly-reconstituted Office for Civil Rights has also announced that it will develop a policy governing "hostile" racial climates in the classroom. Douglas S. Onley, *OCR Targets Instructors' Role in Fostering Racial Hostility*, EDUC. DAILY, Mar. 12, 1993, at 1, 3.

I believe in self-censoring, however. Even if it sacrifices the perfect *bon mot* or ideally placed riposte, this seems a modest price to pay to avoid making a hurtful remark or employing an inappropriate example. Nor does my highly protective notion of professorial academic freedom of necessity flatten the opportunity for self-expression among students or "dumb down" the discussion. Faculty and students have a great amount of elbow room in class, and a self-imposed code of professorial teaching conduct is no great loss of autonomy or essential authority. We may not all be Mark Hopkins on a log,[150] but we should strive to keep the Dean Isibors and Professor Kingsfields from becoming the norm.

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[150] *See* note 33 *supra* and accompanying text.

FACULTY PERFORMANCE EVALUATIONS: CONFIDENTIALITY AND OPEN RECORDS, EMPLOYMENT DISCRIMINATION AND TERMINATION OF EMPLOYMENT

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I. INTRODUCTION.

Evaluations of college and university faculty today implicate a significant number of legal issues and concerns, and the number of such issues is growing at an alarming rate. This growth of the legal complexity involved in completing faculty evaluations is a byproduct of the general litigation explosion occurring in the United States. The faculty member who is dissatisfied with an employment decision today has a large number of weapons with which to attack the institution's employment decisions. Often the disgruntled faculty member or his or her attorney identifies the performance evaluation process as a source of information and/or ammunition in challenging an employment decision.

Compounding the legal complexity of the faculty evaluation process are a number of distinct and vested interests which are often disharmonious. Included are the interests of the university or college in maintaining the confidentiality of personnel records and the similar interest of individual faculty members in confidentiality. Competing with these interests is the general interest of the public in obtaining and maintaining access to documents generated by public entities. Alleged victims of employment discrimination have a unique interest in obtaining free access to their own personnel records as well as to the personnel records of their peers. A faculty association or a labor union -- interest in protecting all legally protectable interests of all members of the bargaining unit. Finally, the interests of the persons who actually fill out evaluation forms must not be overlooked. Natural human tendencies to be careless, indifferent, vindictive, or overly generous are magnified when reflected in faculty evaluations. Any of these traits can skew the evaluation process significantly.

This article will briefly touch upon a two primary fields of legal issues currently associated with the faculty evaluation process: issues implicated by privacy and confidentiality as opposed to open disclosure, and issues related to the role which evaluations play in the termination of faculty members.

II. DISCLOSURE VERSUS CONFIDENTIALITY.

A. Legal Standards.

Several different legal fields are associated with disclosure and non-disclosure of faculty evaluations. These legal standards are summarized below.

1. The Right Of Privacy.

a. Federal Law.

Although it is not specifically enumerated in the U.S. Constitution, the United States Supreme Court has held that there is a federal constitutional right to personal privacy. Finding a "penumbra" of fundamental guarantees implicit in the Bill of Rights, including a right to personal privacy, the Court struck down a state law denying married couples access to contraceptives in Griswold v. Connecticut, 381 U.S. 479 (1965). Significantly, Griswold established that there exists a zone of privacy into which government must not unreasonably intrude. In subsequent cases, the Court has expanded the scope of this right, particularly where an express guarantee exists as well, such as the First Amendment's protection of the freedom to associate and the Fourth Amendment's protection from unreasonable searches and seizures. In the workplace, public employers -- generally, the only employers directly restrained by federal constitutional prohibitions -- must not infringe this area of an employee's privacy in its policies and practices.

b. Common Law Privacy Rights.

Courts have long recognized several causes of action involving the intrusion into the personal privacy of individuals: (1) appropriation of the name and likeness of another; (2) unreasonable intrusion upon the seclusion of another; (3) unreasonable publicity given to another's private life; (4) publicity that unreasonably places a person in a false light before the public.

Each of these torts can arise in the workplace. A claim for appropriation can arise where an employer uses photographs or the names of employees, particularly former employees, in its advertising or marketing. Claims for unreasonable intrusion into an employee's seclusion can arise where an employer engages in surveillance of an employee, for example, during a background check of an employee applying for a sensitive position. An employer can place an employee in a false light by publicizing sensitive facts about the employee, for example, telling a group of employees that another employee was fired for dishonesty when in fact the employee had resigned with no proof of any dishonesty. An employer can unreasonably publicize private facts about an employee by telling others that the employee was suffering from AIDS or had recently been divorced.

While defamation is the most common claim brought by plaintiffs alleging that their privacy has been invaded by their employers' dissemination of information, these other privacy torts remain important and viable. Appropriation can be established where a plaintiff's name or likeness has been used, regardless of whether the use damaged the plaintiff's reputation. Intrusion does not require any dissemination of the information the employer has obtained. A cause of action can be stated for public disclosure of private facts, even where the facts disclosed are true and not defamatory. While the false light tort often accompanies a defamation claim, the false light need not be defamatory.

c. State Law.

Various states have recognized the right to privacy. For example,

Article I, Section 1 of the California Constitution was amended by the voters in 1972 to provide:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy.

Unlike the right of privacy guaranteed by the Fourth Amendment, California's right of privacy limits the conduct of private employers as well as the government. Although the full scope of California's constitutional privacy right remains unclear, the California Supreme Court has stated that the privacy provision is directed at four principal mischiefs, including the overbroad collection and retention of unnecessary personal information by government and business interests, the improper use of information properly obtained for a specific purpose, and the lack of reasonable check on the accuracy of existing records. White v. Davis, 13 Cal. 3d 757 (1975).

The right of privacy guaranteed by Article 1, Section 1 of the California Constitution has been interpreted as protecting employee personnel files from disclosure to third parties. In Board of Trustees v. Superior Court, 119 Cal. App. 3d 516 (1981) cert. denied, Doug v. Board of Trustees, 484 U.S. 1019 (1988), the court denied a former Stanford professor's request to inspect the personnel records of certain Stanford faculty members on the ground that the former professor had not demonstrated sufficient relevance or necessity outweighing the faculty member's constitutional guarantee of privacy. The court found that Stanford, as the custodian of private information, could not waive the privacy rights of employees who were constitutionally guaranteed this protection. As in Board of Trustees, this issue arises with particular frequency during the discovery phase of employment litigation where the plaintiff attempts to prove disparate treatment and asserts a need for information pertaining to similarly situated employees.

Similarly, Article I, section 6 of the Illinois Constitution provides:

> The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized. (Constitution, Article I, Sec. 6)

Other states have also incorporated the right of privacy into their constitutions. See, e.g. Alaska Constitution, Article I, Section 22; Louisiana Constitution, Article I, Section 5; Washington Constitution, Article I, Section 7.

In Massachusetts, the individual right of privacy is protected by statute:

> A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages. (Ch. 214, Sec. 1B)

The right of privacy is also guaranteed by statute in Rhode Island, Rhode Island General Laws, section 9-1-28.1; and in Wisconsin, Wisconsin Statutes Annotated, section 895.50

d. Waiving The Right To Privacy.

An employee may waive the privacy of his or her own personnel records, and often does so, by authorizing the release of personnel information to his or her union. In one case, an employer bargained with the union for the establishment of an employee privacy protection plan wherein employee records were not to be released without employee authorization. The union filed a refusal to bargain charge when the company refused to release attendance records to the union for a grievance hearing because the employees had withheld authorization. The court concluded that the employer's conduct was not illegal; it did not have to release the records absent consent because the company's plan was instituted to protect employee privacy, not to hinder the union, and the employee release requirement was a minimal burden on the union. New Jersey Bell Tel. Co. v. NLRB, 720 F.2d 789 (3d Cir. 1983). When an employee sues his or her employer for wrongful discharge, failure to promote, or for disciplinary action or other employment decisions, the employee generally is held to have placed his or her employment history at issue, thereby waiving the right of privacy with respect to his or her personnel records for purposes of the lawsuit.

2. Open Records Laws.

All public agencies, including public colleges and universities, need to be aware of and evaluate the potential impact which public records laws will have on the confidentiality and disclosure of faculty evaluations. Several states have adopted open records laws.

The California Public Records Act is found in Government Code sections 6250-6268. The introductory provision of the Act, Government Code section 6250, declares the policy to be served by the Act: "the Legislature . . . finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." The Act, like the federal Freedom of Information Act (FOIA: 5 U.S.C. section 552), favors disclosure of public records. Support for refusal to disclose information "must be found, if at all, among the specific exceptions to the general policy that are enumerated in the Act." State of California ex rel. Division of Industrial Safety v. Superior Court, 43 Cal. App. 3d 778, 783 (1974); see also Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 654 (1974).

The Act applies to any "public record." The term "public record" is broadly defined in section 6252(d) and "includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."

California Government Code section 6254 also provides that certain records are not required to be disclosed, including "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy."

California Government Code section 6254(c), which exempts personnel files from disclosure under the Act, does not exempt disclosure of employment contracts. This is because section 6254.8 expressly provides that employment contracts of public employees are public records. There is also no right to privacy in the salary of an employee. Salary information must be disclosed. The California Attorney General has construed Government Code section 6254.8 to require the disclosure of the salary of a public employee, notwithstanding the personnel file exemption in Government Code section 6254. 63 Op. Atty Gen. 215 (3-18-80).

Numerous other states have adopted laws granting open access to public records. E.g. Arkansas Code of 1987, Section 25-19-105; Vernon's Texas Civil Statutes, Section 3(a), Article 6252-17a.

3. Employee Access To Personnel Files.

In most states, the right of an employee to inspect his or her personnel file is guaranteed by statute. Alaska's statute is typical:

> An employer shall permit an employee or former employee to inspect and make copies of the employee's personnel file and other personnel information maintained by the employer concerning the employee under reasonable rules during regular business hours. The employer may require an employee or former employee who requests copies of material under this subsection to pay the reasonable cost of duplication.

Alaska Statutes, Section 23.10.430(a). Other states have adopted similar provisions. E.g California Labor Code section 1198.5, General Statutes of Connecticut section 31-128; Illinois Revised Statutes, Ch. 48, sections 2001-2012.

4. Internal Institutional Documents.

A college or university facing either a request to either disclose a faculty evaluation or to keep confidential such documents should review certain internal documents prior to acting on the request. For example, many faculty association collective bargaining agreements contain provisions related to personnel records and evaluations. In addition, the internal policies, rules and regulations of the college or university may set forth obligations with regard to the retention and disclosure of personnel records and faculty evaluation documents.

The rules set forth in internal policies and collective bargaining agreements can go above and beyond the requirements established by state and federal law. When addressing personnel records requests, careful attention must be paid to these internal rules.

5. EEOC v. Pennsylvania.

The legal doctrines summarized above clashed ominously in the recent case of University of Pennsylvania v. E.E.O.C., 110 S.Ct. 577 (1990). The Pennsylvania case is destined to become a landmark case in the areas of employee evaluation confidentiality and access to records. The Supreme Court's ruling is summarized below.

In 1985, the University of Pennsylvania denied tenure to Rosalie Tung, an associate professor on the Wharton faculty. Tung subsequently filed a sworn charge of discrimination with the Equal Employment Opportunity Commission (EEOC), claiming that she was a victim of discrimination on the basis of race, sex, and national origin, in violation of Title VII of the Civil Rights Act of 1964. In her charge, Tung stated that the department chair had sexually harassed her, and she believed that after she insisted their relationship remain professional, he had submitted a negative letter to the University's personnel committee which had ultimate responsibility for tenure decisions. She also alleged that her qualifications were "equal to or better than" those of five named male faculty members who received more favorable treatment.

Tung noted that the majority of the members of her department had recommended her for tenure, and that she had been given no reason for the decision against her, but that she had discovered through her own efforts that the personnel committee had tried to justify its decision "on the ground that the Wharton School is not interested in China-related research." Tung claimed that this was "simply their way of saying they did not want Chinese-American, Oriental woman in their school."

When the EEOC began its investigation of Tung's charge it requested a variety of relevant information from the University. The University refused to provide certain information, claiming that Tung's tenure-review file and the tenure files of the five male faculty members were "confidential peer review information, not subject to EEOC subpoena." The EEOC concluded that the withheld documents were needed in order to determine the merit of Tung's charges, and sued. The United States District Court for the Eastern District of Pennsylvania issued a brief enforcement order, which was affirmed by the Court of Appeals for the Third Circuit. The U.S. Supreme Court granted review.

Before the Supreme Court, the University of Pennsylvania raised two claims. First, it argued that as a university it had a qualified common-law privilege against disclosure of confidential peer review materials. Second, it asserted a First Amendment right of "academic freedom" against wholesale disclosure of the contested documents. It urged the Court to stay the enforcement order and instead require a judicial finding of particularized necessity of access, beyond showing of mere relevance, before peer review materials would have to be disclosed.

The Court rejected the University's common-law privilege claim, which the appellant alleged was grounded in Federal Rule of Evidence 501. Citing Trammel v. United States, 445 U.S. 40, 51 (1980), the Court expressed its reluctance to "create and apply an evidentiary privilege unless it 'promotes sufficiently important interests to outweigh the need for probative evidence.'"

> We are especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself. (citation omitted.) The balancing of conflicting interests of this type is particularly a legislative function. Congress, in extending Title VII to educational institutions and in providing for board EEOC subpoena powers, did not see fit to create a privilege for peer review documents.

University of Pennsylvania v. E.E.O.C. 107 L.Ed 2d 571 at 582.

The Court was equally unswayed by the University's novel argument of "academic freedom."

> As Congress has recognized, the costs associated with racial and sexual discrimination in institutions of higher learning are very substantial. Few would deny that ferreting out this kind of invidious discrimination is a great, if not compelling, governmental interest . . . [D]isclosure of peer review materials will be necessary in order for the Commission to determine whether illegal discrimination has taken place. Indeed, if there is a 'smoking gun' to be found that demonstrates discrimination in tenure decisions, it is likely to be tucked away in peer review files.

Id. at 584.

The Court concluded that the adoption of a requirement that the EEOC demonstrate a "specific reason for disclosure," beyond a showing of relevance, would place a substantial litigation-producing obstacle in the way of EEOC's efforts to investigate and remedy alleged discrimination.

The Supreme Court's ruling is particularly significant because it appears to clear the way for two new "rights": a) the right to discover confidential communications in an employment context based upon the filing of an EEOC complaint, such as confidential letter written by peer evaluators and the department chair; and b) the right to discover confidential communications about other employees, for the purpose of determining whether the complaint was treated in a discriminatory manner.

B. Conclusions And Recommendations.

The college or university attorney or administrator faces a formidable task in untangling the jumble of federal, state and institutional restraints on the evaluation process. In order to better address faculty evaluation issues relating to confidentiality and disclosure, a few suggestions are set forth below.

First, it is recommended that a strict limit be placed on the number of persons who can actually grant or deny requests to see personnel records. Ideally, only one individual in the institution should be vested with this decision-making authority. This person, who can informally be called "the gatekeeper" should be trained on the fundamentals of state and federal law, along with institutional policies, regarding access to personnel records. Along with foundational training in the regulation of access to records, the gatekeeper must exploit available resources for keeping informed of changes and developments in the regulations. The gatekeeper must subscribe to and read periodicals and publications which summarize recent developments in employment law.

In addition, all individuals who are involved in the review/evaluation process ("the evaluators") must receive training in the fundamentals of employment discrimination law. This training must be periodically reinforced, on at least an annual basis, including repeat training in the fundamentals and discussion of recent developments in equal employment opportunity law. Further, the evaluators must receive regular, periodic training in the basics of personnel records confidentiality and access law.

Finally, a college or university should at least consider adopting an institution-wide philosophy that evaluation documents, even when labeled as "confidential," could ultimately be subject to public disclosure, and therefore must be drafted with extreme caution. As the decision in the Pennsylvania case demonstrates, evaluation documents which for years have considered to be strictly confidential can become overnight subject to public scrutiny.

III. THE ROLE OF EVALUATIONS IN FACULTY TERMINATION.

The discussion of faculty evaluations in the foregoing sections have focused primarily on concerns raised because colleges and universities frequently desire that such documents remain confidential. However, in certain circumstances faculty evaluations have always been drafted with the idea that some day they might be provided for public review before a court or arbitrator.

Typically, when a college or university takes steps to terminate the employment of a faculty member. the performance evaluations of the faculty member take center stage. When termination is sought, the evaluations are microscopically examined, and the evaluators themselves are subject to a demanding and intense evaluation process -- the evaluators are evaluated on their evaluation abilities and skills.

To be of real value in the termination process, evaluation process itself must contain certain key elements. First, the form itself must be validated. The form must accurately measure what it purports to measure. The essential functions of the job should be identified, and the primary focus of the evaluation should be placed squarely on those functions.

In addition, the procedure for faculty evaluation should be as uniform as possible from one department to the next. This will assist in charges of employment discrimination, where an alleged discriminatee in one department may look to other departments in the institution for a statistical pool on which to base a discrimination charge.

Obviously, evaluations must be completed in a timely fashion, following all applicable deadlines, and an opportunity must be provided for meaningful input by the person being evaluated. Significant advance planning is required -- last-minute evaluations may be of less value in a termination case than no evaluations at all.

The evaluator should not allow good or bad ratings in one area to color or taint ratings in other areas (the "halo" effect). The evaluator should review previous evaluations for patterns, and should seek input from others prior to finalizing the evaluation document. All evaluators should be cognizant of the possibility of "grade inflation." Grade inflation is the giving of marks higher than those actually earned, and typically occurs when the evaluator wants to be perceived as a "nice person" and seeks to motivate through positive, rather than negative, reinforcement. Unfortunately, such evaluations do both the faculty member and the evaluator a disservice, by not giving honest and accurate feedback.

Indeed, the simple failure to accurately evaluate and criticize employees can generate liability. A federal court has recently held that it can be discriminatory for an employer to give an admittedly unsatisfactory minority employee excessively high ratings. Vaughn v. Edel 918 F.2d 517 (5th Cir. 1990).

In Vaughn, an employee complained that her immediate supervisors criticized her work because she was black. To avoid any possibility of a race discrimination suit, the Company told the supervisors not to criticize her performance. For two years, the supervisors refrained from criticizing or giving the black employee unsatisfactory evaluations, even though she was one of the poorest performers in their department. During this time, her annual written evaluations (which she never saw) rated her as "satisfactory," and she received a merit salary increase.

When the Company was forced to cut back two employees in the department, it selected its two poorest performers. Not surprisingly, one of these two was the black employee, who had been determined to be the "lowest ranked" individual. She then filed suit, claiming she was selected for termination because of her race.

The court agreed that the black employee was the poorest performer in the department. Nevertheless, the court held that the Company had engaged in racial discrimination by failing to criticize the black employee the same way that it criticized similarly poor-performing white employees. Accordingly, the Company did not afford her the same opportunity to improve her performance as it did its white employees.

The court acknowledged that the employer was not motivated by racial hostility toward the black employee, but rather, was merely acting out of self-interest; hoping to avoid race discrimination charges that the employee might have filed had she continued to receive criticisms and low evaluations. However, the court pointed out that the employee was treated differently because she was black. Thus, the court concluded it was illegal race discrimination to treat the employee differently because of her race even if that disparate treatment was not motivated by racial hostility.

This case underscores the importance of fairly and accurately evaluating all employees, for equal employment opportunity for employees necessarily includes an equal exposure to criticism and counseling regardless of race, sex or other protected-category status.

As a final suggestion, colleges and universities should at least consider the implementation of a post-tenure review process. Many institutions have found this process to be a useful tool in maintaining high standards of performance from senior faculty members.

IV. CONCLUSION.

Navigating the minefield of laws and regulations related to the faculty evaluation process can be tiring and frustrating. Only through a thorough understanding of the applicable state, federal and institutional laws which apply to the process, can the college or university administrator or attorney can take steps to reduce potential liability and to increase the utility of faculty evaluations in taking steps to improve performance or institute dismissal proceedings.

Northeastern University

Office of the Provost

MEMORANDUM

TO: Daryl A. Hellman, Executive Vice Provost

FROM: Halee Burg, Special Assistant to the Provost

DATE: February 10, 1993

SUBJECT: Post-Tenure Faculty Evaluation

INTRODUCTION

The subject of post-tenure faculty evaluation ("PTFE") is one which has recently become of vital interest to higher education faculty and administrators and is the topic of serious, focused discussion and debate at many colleges and universities nationwide. Largely because of the Age Discrimination in Employment Act's imminent prohibition of mandatory retirement age requirements for tenured faculty, institutions are grappling with ways in which they can ensure accountability and continued excellence in faculty performance without threatening the very nature of tenure itself. While a summative, sanctions-based faculty evaluation scheme would be likely to fail almost anywhere, a formative, developmentally-based system of evaluation has the potential to offer the dual rewards of increased faculty performance at all levels and decreased faculty stagnancy.

There is a dearth of literature regarding this issue. While post-tenure faculty evaluation was the subject of some discussion and writing in the early-to-mid 1980s, there are only a handful of articles from that period and little has been written since. A lack of available models for review is consistent with the lack of available literature. While community, technical and junior colleges have embraced post-tenure review to a degree, very few four-year colleges and universities have post-tenure review systems which we can examine for guidance in policy development.

THE DEBATE

Higher education faculty and administrators have been debating the issue of PTFE sporadically over the years. The debate can perhaps be summarized as follows: accountability, excellence and development v. independence, scrutiny and security threat.

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A comprehensive examination and discussion of this topic occurred at a 1983 Wingspread conference entitled "On Periodic Evaluation of Tenured Faculty". Representatives from the ACE and AAUP attended the joint conference and discussed "what is meant by periodic evaluation", "evaluation as a check against poor performance", and "practical considerations: gains and losses."[1] ACE has been a major supporter of PTFE; AAUP has been consistently opposed to it. At the conclusion of the meeting, the participants issued a joint statement.

The consensus statement that emerged reaffirmed the participants' commitment to tenure and to the principle of academic freedom. It reflected majority agreement regarding the following:

1. Current procedures for evaluating academic performance are satisfactory and must be explained to supporters of higher education who may believe insufficient evaluation occurs;

2. A formal system of periodic evaluation overlapping existing procedures would bring little benefit and would incur unacceptable costs, not only in dollars and time but in diminishing creativity and endangering collegial relationships; and

3. The results of any evaluation system should not be used as grounds for dismissal. That should be governed by other established procedures which provide the necessary due process safeguards.[2]

Shortly following this conference, in November 1983, the AAUP adopted its own statement on PTFE, welcoming the Wingspread statement and adding that "no procedure of faculty evaluation should be used to weaken or undermine the principles of academic freedom and tenure."[3] This concern is one on which both proponents and opponents of PTFE agree -- that "post-tenure review cannot succeed if it is intended or designed to identify faculty members whose tenure is sought to be revoked."[4] In fact, some institutions which have developed a PTFE system have explicitly provided that such review, by itself, cannot be used as the basis for revoking or modifying a faculty member's tenure.

On top of the criticisms of PTFE already cited, opponents voice concerns over faculty competition, mistrust, hostility, and permanent insecurity. They also charge that individual creativity may be compromised in the effort to conform to the perceived values of evaluators. Finally, critics claim that formal PTFE is unnecessary because it already takes place on a regular basis in several forms such as student evaluations, promotion evaluations, merit evaluations, faculty development awards, the evaluation of grant proposals and sabbatical and other leave requests. Supporters of PTFE respond that these assessments may often be superficially or unevenly conducted. They believe that only systematic, comprehensive, regular tenured faculty evaluations utilizing clearly articulated criteria and procedures which guarantee equal treatment can ensure that the objectives of excellence in performance and professional development can be achieved. And, proponents argue, properly designed PTFE systems can also assist in decisionmaking regarding fiscal and intellectual resources, department development, reinforcing individual strengths and enhancing individual creativity.

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[1] "On Periodic Evaluation of Tenured Faculty: A Discussion at Wingspread, August 24-26, 1983," Academe (November - December 1983), p. 1a.

[2] Id.

[3] November 1983 statement approved by AAUP Committee A on Academic Freedom and Tenure and adopted by AAUP council.

[4] Marianne Wesson and Sandra Johnson, "Post-Tenure Review and Faculty Revitalization", Academe (May - June 1991), p. 54.

STUDIES OF PTFE SYSTEMS

As a result of the Wingspread conference, Brandeis University Professor Bernard Reisman conducted a study of PTFE. A pre-tested survey questionnaire was sent to four chairpersons and two administrators at each of twenty-six universities. (Twenty schools were chosen based on their similarity to Brandeis; six were chosen because they had some existing program for evaluating tenured faculty.) The majority of respondents (68 percent response rate) believed that the net effect of PTFE benefits a university. Note, however, that the form of review undertaken at institutions studied varied greatly. Some utilized annual faculty self-completed reports; others utilized periodic departmental reviews, which may have taken the form of merit or salary reviews (summative), and only a handful incorporated the type of developmental, non-salary based periodic review (formative) which will be discussed below. Most respondents believed that PTFE is more effective with "star" faculty and least effective with faculty of low reputation and productivity.

The summative form of review, overall, was perceived as "pressure-laden and superficial". Faculty involved in summative reviews often receive little feedback from the process, and to the extent that results are discussed, are often perceived to occur "in a summary fashion."[5]

The formative mode of review, on the other hand, not only received more favorable evaluations from respondents, but was not perceived as a threat to tenure. These reviews, specially designed for tenured faculty, "provide a systematic review of the professor's functioning with the objective of providing feedback to enhance performance and to clarify future career directions."[6]

In 1988, Hans Andrews and Christine Licata conducted a study of PTFE at over 300 community, technical and junior colleges in the North Central region of the country. Of course, among this group of colleges, in contrast to most senior colleges and universities, classroom effectiveness is the primary criterion utilized in post-tenure evaluation. Almost all institutions Andrews and Licata examined employ post-tenure evaluations. While these evaluations often result in the establishment of a development plan, faculty perceive that these development plans are not implemented effectively and that often they are left to their own devices in carrying these plans out. Overall, many more administrative than faculty respondents viewed these evaluations as either "very effective" or "effective."

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[5] Bernard Reisman, "Performance Evaluation for Tenured Faculty: Issues and Research", Liberal Education 1986, Vol. 72, No. 1., p. 83.

[6] Id., p. 82.

The problems with PTFE most frequently mentioned by both faculty and administrators were (1) the ineffective implementation of development plans; (2) the lack of a reward system; and (3) inadequate training of evaluators. Another problem frequently mentioned was the lack of a mechanism to measure competence/incompetence.

The most significant findings from the study were the following. There was strong agreement among respondents in support of periodic post-tenure evaluation. Respondents recommended that a faculty development program should be implemented in conjunction with PTFE, and that PTFE should encompass multiple sources of input. In addition, while there was little agreement whether these evaluations actually serve to weed out incompetent faculty, almost all participants believed such evaluations should serve to weed out incompetent faculty. Finally, faculty indicated that PTFE should have consequences at all performance levels: development and growth for those who need it, and recognition and incentives for those who are consistently excellent performers.

WHAT DO PTFE SYSTEMS LOOK LIKE?

There are very few senior colleges and universities utilizing formative, developmentally-based PTFE systems. Because many institutions are now examining these types of evaluation systems, and because we have a number of devices for conducting summative evaluations, including merit reviews, I will now describe several evaluation systems, most of which are formative both in origin and practice. These systems function as described below.

1. University of Hawaii: various locations, @ 24,000 students, 1250 faculty

The University of Hawaii began developing guidelines for PTFE in 1986. The procedures they developed have been utilized since that time and generally have been considered effective. The three principles which guided the development of Hawaii's policy were: (a) the review must not threaten a faculty member's tenure; (b) one's performance must be examined in view of fair and reasonable departmental expectations; and (c) the review must encourage professional growth. The review process encompasses eight steps:

1. Each department's faculty develop statements of expectations for their tenured faculty, by rank.
2. Each faculty member submits an annual updated CV or resume.

3. The chairperson notifies each faculty member who will be reviewed in a given year and solicits from him/her any additional material he/she wishes to submit. Faculty who have not received tenure, a promotion, or a merit increment during the past five years are eligible for review.
4. The chairperson, by him/herself, reviews the faculty member's performance vis-a-vis the departmental expectations.
5. If the chairperson concludes that the faculty member has met departmental expectations, he/she advises the faculty member and the dean and the review is complete.
6. If the chairperson determines that there are deficiencies in any area of a faculty member's responsibilities, the chairperson and the faculty member work together to formulate a mutually agreeable development plan. If extradepartmental funding is needed, the chairperson requests approval from the dean. The faculty member may call upon a peer faculty development committee for assistance in developing an achievable plan.
7. If the chairperson and faculty member cannot agree on the content, timetable or funding for the plan, the dean will mediate and develop a plan which is mutually acceptable.
8. If the chairperson and the faculty member do not agree regarding whether deficiencies exist, a campus-wide five-member faculty evaluation review committee will make a final, binding decision. A faculty member may exclude any member of the committee pool who he/she feels may be biased. If the committee determines that the faculty member has met departmental expectations, the review is complete. If the committee finds that the faculty member has not met expectations, he/she must produce an acceptable development plan or may be sanctioned.

Hawaii's review process has had a significant impact on faculty productivity and has impacted retirement and retirement planning. The vast majority of faculty reviewed have received favorable reviews; of those who have not, most have quickly formulated development plans. In some instances where departmental relationships have become uncomfortably strained, lateral transfers have been undertaken. "Enlightened management and dedication to the principles of tenure and academic freedom may actually rescue careers and whole departments from continued strife where obvious and beneficial reassignments are possible."[7]

2. California State University (Long Beach): various locations, 33,000 students, 1060 faculty

The California State University system mandates PTFE in its unionized contracts. The express purpose of these reviews is to maintain and improve a faculty member's effectiveness; in practice, these reviews tend to be neither summative nor formative. At

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[7] Madeleine J. Goodman, "The Review of Tenured Faculty: A Collegial Model", Journal of Higher Education (July - August 1990), p. 421.

Long Beach, the reviews are carried out and lip service is made to the requirement; however, the evaluations are not particularly results-oriented.

The evaluations take place every five years. They are conducted by a peer review committee of the department (or equivalent unit) and an administrator. Faculty members are provided with a copy of the peer committee report and the committee chair and the administrator meet with the faculty member to discuss his/her strengths, weaknesses and any suggestions for improvement. The committee's and administrator's summary reports are then placed in the faculty member's personnel file.

Each department develops its own review procedures. Because there are nineteen campuses in the state system and sixty-seven departments at Long Beach alone, there is little uniformity among procedures. Some departments draft very short evaluation reports; others may be a page or two, and yet others may draft an informal development report.

3. St. Lawrence University: Canton, New York, 2100 students, 165 faculty

At St. Lawrence, if a tenured faculty member has not been reviewed as part of regular promotion or other procedures in the four-year period following his/her tenure appointment, the dean and department chairperson shall review his/her performance "with special attention." These reviews are undertaken at the end of any subsequent four-year period in which no other formal review takes place. If the dean concludes that a reason for concern regarding the faculty member's performance exists, he/she shall discuss it with the faculty member and place a memo in the personnel file regarding the discussion. If, after a time interval fixed during that discussion, the reason for the concern continues to exist, the dean may either request a committee on professional standards to initiate further peer review or may institute termination proceedings. This process is potentially more summative in nature than any others reviewed.

4. Coe College: Cedar Rapids, Iowa, 1200 students, 85 faculty

Coe College reviews tenured faculty at four-year intervals after they receive tenure. The reviews are based on student evaluations, a self-evaluation, and a report prepared by the department chairperson. The faculty self-evaluation includes a description of one's activities in teaching, professional growth and development, and a summary of other contributions to the college. A projection of future activities is also required. The department chairperson's report includes a discussion of the faculty member's teaching effectiveness, an evaluation of his/her professional growth, comments of his/her non-teaching college-related activities, and a statement regarding comments on student evaluation data. The Faculty Handbook does not indicate the process for examining these materials.

5. West Chester University: West Chester, PA, 12,000 students, 495 faculty

West Chester's post-tenure reviews occur five years after tenure is received, and each succeeding five years thereafter. If a faculty member is on leave for any portion of the evaluation year, the evaluation is postponed to the following year. If deemed necessary by the department or dean, interim evaluations may be administered.

A departmental committee of not less than three faculty evaluates the following materials: student evaluations, peer evaluations, an updated vitae and any other data the faculty member submits. Peer evaluations include the results of classroom visitations by the peer committee once each semester during the evaluation year and by the department chairperson once during the review year. Note, however, that classroom visitation evaluations are not reduced to writing until the observations are discussed with the faculty member being reviewed.

The peer committee discusses its overall evaluation with the faculty member and then submits its written evaluation to the dean, department chair and the faculty member. If the faculty member disagrees with the evaluation, he/she may send a written response to the dean.

The chairperson discusses the evaluation with the faculty member and sends his/her own independent evaluation, with a recommendation, to the dean. His/her evaluation is based on his/her personal observations and knowledge as well as on the materials submitted by the peer committee and faculty member.

The review concludes with a written evaluation by the dean. The dean discusses the review in detail with the faculty member. The dean describes any aspects of the faculty member's performance which require improvement.

Post-tenure faculty evaluations at West Chester are sometimes used as a development plan. West Chester does not conduct merit evaluations. Post-tenure evaluations may be merged with evaluations for promotion.

6. Earlham College: Richmond, IN, 1,110 students, 80 faculty

Post-tenure evaluations at Earlham College are undertaken solely to maintain and advance teaching competence. They occur every five years after the award of tenure until the age of sixty. (Note: the evaluation process is under review -- presumably, the age cutoff is one of the items being examined.) The evaluations are not designed to question one's competence to hold tenure. In fact, neither the evaluation nor any of the materials collected for it may be used in any tenure removal proceeding. A faculty member may request that the evaluation be delayed due to a sabbatical or other leave.

Early in the assessment year, the faculty member and the provost (or his/her designee) confer regarding the details of the assessment. They agree on a three-member committee to review and evaluate the faculty member's dossier. They also determine from whom student and peer reviews will be requested.

The dossier is compiled. It includes a thoughtful, comprehensive self-evaluation which emphasizes professional and personal plans and needs for the next five years. It also contains student evaluations (a faculty member may opt to develop their own evaluation form), letters from past and present students, administrative and faculty colleague letters (intra/extradepartmental), and any other relevant documents.

During the fall, the peer committee consults and works with the faculty member being reviewed. During the next term, the committee evaluates the dossier and these consultations. The committee submits a written report to the Provost and the faculty member. The Provost confers with the faculty member regarding how the college can contribute to his/her growth and development. If appropriate, the Provost may suggest the assistance of a teaching consultant or other faculty member willing to help in improving the faculty member's teaching performance.

7. Carleton College: Northfield, Minnesota, 1800 students, 160 faculty

Carleton College's recently developed Senior Faculty Development Program provides "a regular opportunity for faculty to reflect on past teaching, research and service activities and to plan a course of professional development for the future in an atmosphere of collegial and institutional support."[8] It consists of a self-assessment and conversation with the dean; it may also include other activities.

Every seven years after receiving tenure, each senior faculty member designs a process of reassessment and planning. The process should be creative and personal, and may include such things as a discussion of one's teaching and/or scholarly activity with colleagues, feedback from students, participation in a professional development activity, videotaping classes, etc. An outline of the process is given to the dean and department chair early in the fall term.

At the end of the year, the faculty member drafts an updated prospectus -- it is retrospective, reviewing all aspects of professional activity since the last prospectus, as well as prospective, outlining plans for new projects and development areas. It may include proposals for college assistance. The program concludes with a conversation with the dean.

This evaluation scheme is the most introspective, developmental review system reviewed. It is the only evaluation system which does not mandate peer evaluation or endorse review by a peer committee. It is entirely formative in nature.

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[8] Carleton College Senior Faculty Development Program Endorsed by FAC and FPC, May 1991.

8. Franklin and Marshall College, Lancaster, PA, 1850 students, 135 faculty

Franklin and Marshall utilizes the "eight-year review." If no other major review (promotion, sabbatical, leave) has taken place in any eight-year period post-tenure, a faculty member will be subject to the eight-year review. The dean or department chairperson may also recommend to the professional standards committee that a faculty member be reviewed during any interim period. The committee will decide whether to conduct such a review.

The procedure for the eight-year review is similar to the procedures used in any other major review. A five-member, university-wide professional standards committee, chaired by the dean of the division (who is non-voting), examines the following: a report on the faculty member by the department chair; the faculty member's self-report, the four merit evaluations which have occurred during the eight-year period; and any other relevant materials in the faculty member's personnel file.

The committee meets to discuss these materials, and the confidential, detailed minutes from this meeting(s) evidence the results of the review. No other written report is generated. The dean discusses the results with the faculty member. This review tends to be summative in nature, and is intended to insure that faculty members are meeting minimal standards of performance. The results of this non-developmental review may, in very serious cases, be used as the basis for faculty member discipline or dismissal proceedings.

9. University of Colorado at Boulder, 21,000 students, 2000 faculty

In 1982, the Colorado laws of Regents were amended to include a requirement for comprehensive faculty post-tenure peer review at least once every five to seven years. The implementing administrative policy statement indicated that the reviews should further faculty development. While each campus is permitted to develop its own procedures for conducting these reviews, each review must incorporate external evidence (national awards, honors, offices, publications, etc.) of a faculty member's performance and result in a summary evaluation statement. The evaluation statement may include a development plan formulated by the head of the primary unit together with the faculty member. These individuals work together to achieve the plan objectives.

The evaluation is conducted by a faculty committee from the faculty member's primary unit (or that faculty in combination with others). Traditional tenure or promotion review criteria -- teaching, research and service -- are examined. If there is disagreement regarding the faculty member's research/creative performance, or if the faculty member or evaluation committee requests, extra-university evaluations will be obtained.

The review summary and any development plan are placed in the faculty member's personnel file and copies are submitted to the dean and to the Vice Chancellor for Academic Affairs. They review the results to insure compliance with procedures. Faculty members may pursue applicable university procedures if they feel aggrieved by the review process as applied to them.

The Vice Chancellor's office maintains schedules of post-tenure reviews from each primary unit as well as a master schedule for faculty review. The effectiveness of post-tenure review procedures is regularly examined, and a university-wide committee monitors faculty review and development efforts. At the end of each academic year, the Vice Chancellor reports to the Chancellor and to the Vice President for Academic Affairs on the results of all evaluations conducted that year.

The Associate Vice Chancellor for Academic Affairs at Boulder reported that the nine-year old system has worked quite successfully. Once faculty overcame their initial feelings of resistance and experienced post-tenure review first hand, they began to realize its benefits as a useful development tool.

CONCLUSION

Formative systems of PTFE have been favorably received and implemented at a small number of colleges and universities. While some of these institutions are quite small and place their primary emphasis on teaching, there is no reason why a PTFE system cannot be adapted to larger, more heavily research-based institutions. The Universities of Colorado, Hawaii, and California State have demonstrated that.

Our faculty would likely benefit from a system of comprehensive, periodic PTFE whose goal would be to encourage and further tenured faculty self-assessment, growth and development. Enhancing performance through feedback and clarifying future career directions need not be inherently threatening objectives. Post-tenure faculty would be evaluated in the same areas as probationary faculty: teaching, research and service. The criteria utilized to examine each of these areas would be similar to the criteria used in probationary faculty evaluations and in tenure and promotion reviews. With respect to teaching and student evaluations, it should always be kept in mind that student evaluations are influenced by class size, instructional mode (lecture/ discussion), type of course (requirement/elective), and instructor age.

If we adopt PTFE, the review should be formative in nature, and should be developed through a well-coordinated administration/faculty initiative. At all stages of policy development, faculty should be assured that the review process is not intended to impinge upon their tenure and academic freedom rights in any way. This needs to be explicit in any written policy. Nor should review results affect salary determinations.

Conducting PTFE at four-to-six year intervals has proven successful elsewhere. This period is sufficient for a faculty member to begin to progress on a development plan, but it is not so long that a faculty member may stagnate unnoticed. If a review reveals that a faculty member's work is seriously deficient, the process should provide the individual with positive developmental options such as a sabbatical (or other leave), retraining or other form of remediation.

A successful PTFE policy should encompass the following additional features:

1. PTFE would be separate from merit or promotion reviews;
2. The review would include a self-assessment and a committee evaluation;
3. Each department or equivalent unit would develop a set of rigorous, but realistic performance expectations (by faculty rank) according to which evaluations would proceed;
4. Present evaluations would be linked to the results of past evaluations;
5. Faculty development or other institutional resources would be committed to PTFE.
6. Either the department chair or the peer evaluation committee chair would meet with the individual evaluated to discuss the review results; the dean may meet with some.
7. The process must insure not only detailed feedback, but also guidance and follow-up in the individual development process.

The following issues should also be explored and discussed in developing a policy for PTFE: whether a written evaluation report would be generated, and if so, whether it would become part of a faculty member's unit personnel file; whether the dean would have an independent voice in the evaluation; to what extent the dean and/or Provost would be involved in "reviewing the review"; whether and under what circumstances external evaluations would be solicited; and whether and under what circumstances the materials utilized in conducting the evaluation could be used in subsequent disciplinary or dismissal proceedings.

COMMENTARY

JUDICIAL REVIEW OF DISCRETIONARY GRANTS OF HIGHER EDUCATION TENURE *

by

JONATHAN M. PARETSKY, J.D., PH.D.**

"The awarding of tenure to a faculty member is the most critical point in the process of selection and reward for achievement that maintains and improves the quality of the faculty." [1] Academic tenure, defined as a faculty appointment for an indefinite period of time, is accompanied by increased prestige, compensation, and freedom.[2] As early as 1939, the D.C. Circuit noted the great emphasis that higher education faculty place on achieving tenure.[3]

Virtually all institutions of higher education have policies governing grants of tenure.[4] These policies are typically creatures of statute and/or contract. Grants of tenure pursuant to these policies establish a property interest protected by the Fourteenth Amendment to the United States Constitution.[5] Some policies set objective tenure requirements, such as a minimum term of service.[6] More commonly, however, tenure policies allow a great deal of discretion on the part of the institution.

Litigation in many jurisdictions has helped define the boundaries of this institutional discretion. This litigation has helped determine which criteria are permissible for an institution to consider in granting or denying tenure. The litigation has also addressed the standard of proof the institution must meet in order to justify its determination. Some discretion may be allowed in the procedure followed by the institution, although courts differ on the extent of discretion permitted. While courts have been reluctant to become involved in tenure decision-making, in some circumstances plaintiffs have used the judicial process to force reversal of administrative decisions.

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* The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 83 Ed.Law Rep. [17] (Aug. 12, 1993).

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[1] *Handbook for Faculty and Other Unclassified Staff,* University of Kansas, 32 (1986).

[2] *Univ. Educ. Ass'n v. Regents of Univ. of Minn.,* 353 N.W.2d 534, 540 [19 Ed.Law Rep. [660]] (Minn.1984). *See also Grimes v. Eastern Illinois University,* 710 F.2d 386, 388 [12 Ed.Law Rep. [241]] (7th Cir.1983): "The purpose of tenure is to protect academic freedom—the freedom to teach and write without fear of retribution for expressing heterodox ideas. . . ."

[3] *Cobb v. Howard University,* 106 F.2d 860, 865–66, n. 21, *cert. denied* 308 U.S. 611, 60 S.Ct. 175, 84 L.Ed. 510 (D.C.Cir.1939).

[4] *Abramson v. Board of Regents, University of Hawaii,* 56 Hawaii 680, 681, n. 1, 548 P.2d 253, 255, n. 1 (1976).

[5] *See Board of Regents v. Roth,* 408 U.S. 564, 577–78, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972).

[6] *See, e.g., Dugan v. Stockton State College,* 245 N.J.Super. 567, 574, 586 A.2d 322, 325 [65 Ed.Law Rep. [806]] (1991).

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Plaintiffs have used a variety of theories to attack tenure decisions, including discrimination, contract, and both substantive and procedural due process analyses. Whichever theory is applied, the plaintiff attempts to prove the institution relied on improper criteria for evaluating the candidate's application or utilized improper procedures in reaching its decision. The following discussion examines the ways in which courts have treated claims of substantive and procedural impropriety.

A. SUBSTANTIVE FACTORS IN TENURE DECISIONS

Primary factors generally to be considered in granting tenure include scholarship, pedagogy, service to the university, and collegiality.[7] These factors relate directly to the academic qualifications of the individual applicant.

Courts generally have upheld application of any particular criterion that relates directly to academic qualifications. Thus, the subjective quality of scholarly research and writing has been held sufficient to justify denying tenure.[8] The failure to obtain a terminal degree is grounds for denying tenure. Even where the teacher was acknowledged to be "tremendous," "remarkable" and a superior teacher, it has been held not arbitrary for a college to deny tenure for lack of a terminal degree.[9] Changing criteria for achieving tenure during the course of the candidate's employment will also withstand judicial challenge.[10]

A teaching philosophy incompatible with the pedagogical aims of the university has been held proper grounds for denying tenure, notwithstanding a claim of academic freedom.[11] Students' evaluations of teaching quality may be considered as a factor in denying tenure.[12] A faculty member's personal views may also be grounds for denying tenure, so long as the views expressed are not in an area of public concern protected by the First Amendment.

In *Omlor v. Cleveland State University*,[13] the plaintiff's alleged statement that, "I like Dean Smith, he's a good guy, for a Jew. I like about 40 percent of the Jewish people I meet," was held to lie within the president's authorized discretion as the exclusive basis for recommending against tenure.

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[7] *Mayberry v. Dees*, 663 F.2d 502, 514 [1 Ed.Law Rep. [493]] (4th Cir.1981).

[8] *See, e.g., Clark v. Whiting*, 607 F.2d 634 (4th Cir.1979); *Langland v. Vanderbilt University*, 589 F.Supp. 995, 1003 [19 Ed.Law Rep. [533]] (D.C.Tenn.1984); *Ford v. Stone*, 464 So.2d 380, 381 [23 Ed.Law Rep. [794]] (La.App.1985); *Amoss v. University of Washington*, 40 Wash.App. 666, 684, 700 P.2d 350, 361 [25 Ed.Law Rep. [618]] (1985).

[9] *Fairchild v. Vt. State Colleges*, 141 Vt. 362, 366, 449 A.2d 932, 934 [6 Ed.Law Rep. [125]] (1982). *See also Coe v. Board of Regents*, 140 Wis.2d 261, 267, 409 N.W.2d 166, 170 [40 Ed.Law Rep. [1003]] *rev. denied* 141 Wis.2d 983, 416 N.W.2d 296 [43 Ed.Law Rep. [377]] (Wis.App.1987); *Lewandoski v. Vermont State Colleges*, 142 Vt. 446, 454, 457 A.2d 1384, 1390 [10 Ed.Law Rep. [223]] (1983).

[10] *See Lewandoski v. Vermont State Colleges*, 142 Vt. 446, 457 A.2d 1384 (1983); Barbara A. Lee, "Raising the Hurdles: Judicial Reaction to Heightened Standards for Promotion and Tenure," 20 Ed.Law.Rep. [357] (1985).

[11] *Hetrick v. Martin*, 480 F.2d 705 (6th Cir.), *cert. denied* 414 U.S. 1075, 94 S.Ct. 592, 38 L.Ed.2d 482 (1973).

[12] *Johnson v. University of Pittsburgh*, 435 F.Supp. 1328, 1359 (W.D.Pa.1977).

[13] 45 Ohio St.3d 187, 191, 543 N.E.2d 1238, 1242 [55 Ed.Law Rep. [1094]] (1989).

On the other hand, advising a student to seek legal counsel in a conflict with a university has been found to be an inappropriate ground for denying tenure.[14] "While public educational institutions generally are entitled to wide latitude when making tenure decisions, a professor or teacher may not be denied tenure in retaliation for constitutionally protected speech. (Citations omitted.)" [15]

In *Levin v. Harleston,*[16] it was held a tenured professor has the First Amendment right to publish articles maintaining blacks are less intelligent and more prone to crime than whites. One queries whether the same facts could have been used to deny the professor tenure if he had been probationary and under consideration for promotion.

General professional excellence may be subservient to the specialized needs of a university. Where the plaintiff was found to be an "outstanding" scientist, the university nevertheless properly considered whether the plaintiff's expertise was relevant to the academic mission of the university.[17]

Institutional interests that are unrelated to the individual's professional performance may also be considered. For example, faculty density in a given area is a proper consideration. In *Coe v. Board of Regents,*[18] the plaintiff contended tenure density was not an enumerated statutory criterion in considering tenure and the chancellor exceeded his authority in considering it. The court found the institutional mission and needs implicit in the individual statutory criteria for granting tenure. "[Plaintiff] suggests that she ought to have been granted tenure regardless of her department's ability to sustain another tenured position and then laid off because her department was overtenured. This is nonsensical.... Interpreting [the statute] as granting automatic tenure regardless of institutional need yields an unreasonable result." [19] An institution's financial situation is also a proper factor in denying tenure, where an alleged shortage of funds does not allow for expansion of the tenured faculty.[20]

In general, then, courts are willing to uphold any reason for denying tenure that in some way relates to the quality, efficiency, or philosophy of the institution. The judicial attitude has not changed since it was stated in 1904 that the employment terms of college faculty "depends upon what is for the best interest of the college" and this determination is best left to the judgment of the board of regents.[21]

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[14] *Stern v. Shouldice,* 706 F.2d 742 [11 Ed. Law Rep. [122]] (6th Cir.), *cert. denied* 464 U.S. 993, 104 S.Ct. 487, 78 L.Ed.2d 683 (1983).

[15] 706 F.2d at 747.

[16] 770 F.Supp. 895 [70 Ed.Law Rep. [404]] (S.D.N.Y.1991).

[17] 435 F.Supp. at 1365–66. *See also Spuler v. Pickar,* 958 F.2d 103, 108 [73 Ed.Law Rep. [434]] (5th Cir.1992).

[18] 140 Wis.2d 261, 267, 409 N.W.2d 166, 171, *rev. denied* 141 Wis.2d 983, 416 N.W.2d 296 (Wis.App.1987).

[19] 140 Wis.2d at 271, 409 N.W.2d at 169–70. *See also Mayberry v. Dees,* 663 F.2d 502, 509 (4th Cir.1981); *Abramson v. Board of Regents, University of Hawaii,* 56 Hawaii 680, 681, 548 P.2d 253, 254 (1976); *Causey v. Board of Trustees,* 30 Wash.App. 649, 652, 638 P.2d 98, 100 (1981).

[20] *See, e.g., Spuler v. Pickar,* 958 F.2d 103 (5th Cir.1992).

[21] *State Board of Agriculture v. Meyers,* 20 Colo.App. 139, 142, 77 Pac. 372, 373 (1904).

Some authority goes so far as to suggest that an institution requires no reason at all for denying tenure. The Fourth Circuit has suggested it is inherent in the nature of a university that good candidates for tenure should be replaced by younger blood:

> A university is compelled to employ the system of 'up or out' . . . even in the case of very good teachers, not because of a streak of cruelty but because of the university's nature as a living and growing organism. Since a university's life should be structured as much as possible to allow opportunities for some of each new year's crop of incipient scholars to be considered for entry into the intellectual continuum, such freedom to terminate those considered for, but not granted tenure, even those qualified, is necessary to make place for those following behind.[22]

Perhaps this dicta can withstand an age-discrimination analysis; it appears nevertheless to undermine the twin premises of tenure, freedom of scholarship and financial security.[23]

It has similarly been held that a university need provide no reason at all for denying tenure when a protected class or a fundamental right is not involved. "[T]he law does not require, in the first instance, that employment be rational, wise, or well-considered—only that it be nondiscriminatory."[24] Under the California constitution and state statutes, a university is not required to disclose the confidential considerations of a tenure review committee when a plaintiff wants to make a case of denial of due process.[25] The Illinois Court of Appeals has similarly held that there is no element of cause in a university's decision to deny tenure.[26]

In the absence of a property right in prospective tenure, perhaps this is the proper outcome. Considering, however, the general requirement that government may not act in a wholly arbitrary manner, and given that a purpose of tenure is to protect the academic freedom of college faculty, it appears unwise to allow tenure decisions to be made cloaked in absolute secrecy, like modern Star Chambers, or to be based on a whim or the cast of a lot. Such a judicial approach appears to reduce to a nullity statutorily- or contractually-created tenure criteria.

B. EXTENT OF DISCRETION IN APPLYING SUBSTANTIVE FACTORS

Assuming that institutions are required to apply substantive criteria in their tenure decisions, the next issue is the degree of latitude administrators enjoy in the way they apply the criteria. As before, there appear to be few restrictions on administrative discretion.

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[22] *Mayberry*, 663 F.2d at 516, n. 35.

[23] *See Akhtar v. Van De Wetering*, 197 Mont. 205, 217, 642 P.2d 149, 157 [3 Ed.Law Rep. [167]] (1982).

[24] *Powell v. Syracuse University*, 580 F.2d 1150, 1156–57 (2d Cir.), *cert. denied* 439 U.S. 984, 99 S.Ct. 576, 58 L.Ed.2d 656 (1978).

[25] *Scharf v. Regents of University of Cal.*, 234 Cal.App.3d 1393, 1405, 286 Cal.Rptr. 227, 234 [69 Ed.Law Rep. [1140]] (1991); *See also Kahn v. Superior Court*, 188 Cal.App.3d 752, 233 Cal.Rptr. 662 [36 Ed.Law Rep. [774]] (1987) (deposition of professor who recommended against tenure to find out if recommendation was based on non-academic reasons not allowed). *C.f. University of Pennsylvania v. EEOC*, 493 U.S. 182, 192–93, 110 S.Ct. 577, 584, 107 L.Ed.2d 571 [57 Ed.Law Rep. [666]] (1990) (different result if discrimination alleged).

[26] *Board of Trustees v. Krizek*, 113 Ill.App.3d 222, 227, 68 Ill.Dec. 770, 774, 446 N.E.2d 941, 945 [9 Ed.Law Rep. [1364]] (1983).

If the administration has *any* legitimate reason for denying tenure, that reason will probably suffice, even if other criteria support granting tenure.[27] Furthermore, the administration is not required to apply the same factors to different candidates for tenure.[28] The First Circuit has held, "When a decision to hire, promote, or grant tenure to one person rather than another is reasonably attributable to an honest even though partially subjective evaluation of their qualifications, no inference of discrimination can be drawn."[29] The Fourth Circuit echoed this opinion: "[S]ince professors are individuals and perform different roles within a department, it is difficult to compare the reasons for promoting one faculty member with the reasons for promoting or not promoting another."[30] Likewise, different departments may set different standards for granting tenure, so long as the standards are not discriminatory and do not exceed the contractual requirements.[31]

Courts have been exceedingly reluctant to re-weigh administrative evaluations of merit. This reluctance makes it difficult to determine what standard courts apply to tenure review cases. It is generally held that the academic institution need only meet a "rational relationship" test or an "arbitrary and capricious" standard of review.[32] Even such a minimal standard appears meaningless when a court grants unlimited latitude to institutions to determine what constitutes academic competence and institutional need. This problem becomes especially acute for plaintiffs attempting to prove claims of discrimination.[33]

Courts typically defer to the asserted superior experience and expertise of higher education administrators.[34] Thus, the court in *Keddie v. Pennsylvania State University*,[35] refused to undertake a *de novo* review of the plaintiff's academic qualifications, holding, "This court is powerless to substitute its judgment for that of the University as to whether plaintiff's academic credentials are such that tenure should have been awarded. The judiciary is not qualified to evaluate academic performance. The courts do not possess the expert knowledge or have the academic experience which should enlighten an academic committee's decision." In *Clark v. Whiting,*[36] the court refused to "second-guess" university authorities with respect to the professional qualifications of a scholar-teacher.

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[27] *See Ford v. Stone*, 464 So.2d 380, 381 (La.App.1985) (weakness in research will support denial of promotion, even where research is one of only many criteria); *Fairchild v. Vt. State Colleges*, 141 Vt. 362, 365, 449 A.2d 932, 934 (1982).

[28] *Mayberry v. Dees*, 663 F.2d 502, 511 (4th Cir.1981); *Wells v. Doland*, 711 F.2d 670, 675 [12 Ed.Law Rep. [324]] (5th Cir.1983); *Dauel v. Bd. of T. of Elgin Community College*, 768 F.2d 128 [26 Ed.Law Rep. [600]] (7th Cir.1985); *Akhtar v. Van De Wetering*, 197 Mont. 205, 219–20, 642 P.2d 149, 157 (1982); *Fairchild v. Vt. State Colleges*, 141 Vt. 362, 368, 449 A.2d 932, 934 (1982).

[29] *Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir.1980).

[30] *Smith v. University of North Carolina*, 632 F.2d 316, 345 (4th Cir.1980).

[31] *Langland v. Vanderbilt University*, 589 F.Supp. 995, 1011 (M.D.Tenn.1984).

[32] *See, e.g., Spuler v. Pickar*, 958 F.2d 103, 108 (5th Cir.1992); *Keddie v. Pennsylvania State University*, 412 F.Supp. 1264, 1270 (M.D.Pa.1976).

[33] *See* Barbara A. Lee, "Threshold Qualifications in Academic Discrimination Litigation," 30 Ed.Law Rep. [1] (1986).

[34] *See, e.g., Lewandoski v. Vermont State Colleges*, 142 Vt. 446, 455, 457 A.2d 1384, 1390 (1983).

[35] 412 F.Supp. 1264, 1270 (M.D.Pa.1976).

Perhaps the most direct pronouncement supporting judicial abstention from evaluating academic qualifications came in *Faro v. New York University.*[37] The court, in oft-quoted language, held a plaintiff may not remove subjective judgments from a university's decision-making process:

> Such a procedure, in effect, would require a faculty committee charged with recommending or withholding advancements or tenure appointments to subject itself to a court inquiry at the behest of unsuccessful and disgruntled candidates as to why the unsuccessful was not as well qualified as the successful. This decision would then be passed on by a Court of Appeals or even the Supreme Court. The process might be simplified by a legislative enactment that no faculty appointment or advancement could be made without the committee obtaining a declaratory judgment naming the successful candidate after notice to all contending candidates to present their credentials for court inspection and decision. This would give 'due process' to all contenders, regardless of sex, to advance their 'I'm just as good as you are' arguments.[38]

In *Goodisman v. Lytle,*[39] the court echoed this sentiment and found the university's contractual tenure guidelines provided virtually no limitation on the discretion of university officials in making tenure decisions. Because of the unfettered discretion, the court held the plaintiff had no property interest in procedures applied by the university.[40]

Not every court, however, has been willing to grant institutions such broad freedom from judicial scrutiny. Dicta in *Honore v. Douglas,*[41] suggests the court would be willing to examine a candidate's qualifications to determine whether a university's denial of tenure was arbitrary and capricious. The court noted the plaintiff had been informed his teaching was adequate; his academic credentials reflected competent scholarship; he had a publication record; and he was active in faculty committees and assisting students.[42] In *University of Hawaii Professional Assembly v. University of Hawaii,*[43] the court upheld arbitrability where an arbitrator found the university's denial of tenure to be arbitrary and capricious.

The Wisconsin Supreme Court has taken a radically different view of judicial scrutiny than did the Fourth Circuit in *Faro.* In *Trojan v. Univ. Wis. Regents Bd.,*[44] the court brushed aside the defendant's arguments that judicial review would unduly burden both colleges and courts and held the courts are the proper place for determining whether a negative tenure recommendation is supported by the evidence.

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[36] 607 F.2d 634, 639–40 (4th Cir.1979).

[37] 502 F.2d 1229 (2d Cir.1974).

[38] 502 F.2d at 1232.

[39] 724 F.2d 818, 821 [15 Ed.Law Rep. [652]] (9th Cir.1984). *See also Ranyard v. Board of Regents,* 708 F.2d 1235, 1237 [11 Ed.Law Rep. [831]] (7th Cir.1983) (regents retain "virtually complete discretion regarding tenure").

[40] 724 F.2d at 820.

[41] 833 F.2d 565 [42 Ed.Law Rep. [1089]] (5th Cir.1987).

[42] 833 F.2d at 569.

[43] 66 Hawaii 214, 217–19, 659 P.2d 720, 723, 725 [9 Ed.Law Rep. [1042]] (1983).

[44] 128 Wis.2d 270, 278, 382 N.W.2d 75, 78 (1985).

Finally, the Fourth Circuit has expressed some reservations about the reliance on *Faro* by other courts to grant institutions virtually unfettered discretion in reaching tenure decisions:

> This anti-interventionist policy [expressed in *Faro*] has rendered colleges and universities virtually immune to charges of employment bias, at least when that bias is not expressed overtly. We fear, however, that the common-sense position we took in *Faro* . . . has been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act of 1964.[45]

If a plaintiff alleging discrimination succeeds in establishing a prima facie case of discrimination, the institution will have to come forward with some evidence supporting its decision to deny tenure. In *Equal Employment Opportunity Com'n v. Tufts Inst.,*[46] the inclusion on a tenure subcommittee of a faculty member who had expressed strongly anti-female attitudes established a prima facie case of sex discrimination. The university failed to produce witnesses who would testify to non-discriminatory motives for denying tenure, and the court awarded injunctive relief.[47]

C. PROCEDURAL CONSIDERATIONS

Most tenure plans involve a multi-tiered review procedure. Usually, at least the candidate's department, academic dean, institution executive, and state board of governors or regents or the board of directors are involved in the process. The recommendations made at one level may be reversed at the next.

Despite the statutory or contractual nature of these procedures, courts have been reluctant to construe them strictly. Where procedural shortcomings in the tenure review do not have a prejudicial effect, courts typically ignore the technical review rules.[48] Furthermore, attempts to extend the requirements of constitutional due process to the tenure review process have usually been futile. Courts have considered non-tenured employees to have nothing more than a unilateral expectation in tenure; not until they are actually accorded tenure do constitutional protections arise.[49]

A remarkable exception to this trend is *State ex rel. McLendon v. Morton.*[50] In *Morton,* the West Virginia Supreme Court held that by establishing a minimum objective standard for tenure (a term of service and teaching competency), the state had created a vested expectation and the plaintiff was entitled to procedural due process.[51] The court stated, "There is obviously a need to permit a latitude of discretion as the issue cannot be framed with mathematical precision or exactitude. What should not be tolerated is a wholly arbitrary and capricious selection process where the competent are turned aside in favor of those less qualified."[52] The court required the college to provide notice of reasons for denying tenure and an impartial hearing tribunal.[53] The court left the burden on the plaintiff, however, to demonstrate the reasons were inadequate or without substantial basis.[54]

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[45] *Powell v. Syracuse University,* 580 F.2d 1150, 1154 (2d Cir.), *cert. denied* 439 U.S. 984, 99 S.Ct. 576, 58 L.Ed.2d 656 (1978).

[46] 421 F.Supp. 152 (D.Mass.1975).

[47] 421 F.Supp. at 165.

[48] *Nzomo v. Vermont State Colleges,* 138 Vt. 73, 75, 411 A.2d 1366, 1368 (1980); *Smith v. Greene,* 86 Wash.2d 363, 375–76, 545 P.2d 550, 557–58 (1976).

[49] *See, e.g., Clark v. Whiting,* 607 F.2d 634, 644 (4th Cir.1979); *Goodisman v. Lytle,* 724 F.2d 818, 820 (9th Cir.1984); *Logsdon v. Ohio Northern Univ.,* 68 Ohio App.3d 190, 197, 587 N.E.2d 942 [72 Ed.Law Rep. [1042]] (1990); *Coe v. Board of Regents,* 140 Wis.2d 261, 272–73, 409 N.W.2d 166, 170, *rev. denied* 141 Wis.2d 983, 416 N.W.2d 296 (Wis.App.1987).

[50] 162 W.Va. 431, 249 S.E.2d 919 (1978).

The Seventh Circuit appears to have analyzed the right to a hearing in a similar fashion. In *Dauel v. Bd. of T. of Elgin Community College,*[55] the court noted the plaintiff met the statutory requirements for tenure, and she was consequently entitled to a hearing on whether an exception to tenure criteria that had been made for other candidates might also be made for her.

In two recent cases, plaintiffs successfully argued breach of contract claims before at the trial court level. The plaintiff in *McDowell v. University of New Mexico,*[56] claimed that the procedures followed by the university in denying him tenure constituted a breach of contract. A jury awarded damages in the amount of $400,000. The complex procedural history of the case and the general verdict make it difficult to ascertain which contractual provision the jury believed had been breached.

In *Stern v. Univ. of Okl. Bd. of Regents,*[57] the trial court granted the plaintiff summary judgment on claims of breach of contract and denial of due process. The Oklahoma Court of Appeals reversed, finding the employment contract vested no protected property interest and the university had acted within its contractual authority.[58] The court recognized again the special autonomy enjoyed by a university in making tenure decisions.[59]

An additional issue that arises frequently is the question of who is vested with the ultimate authority to grant tenure. The general rule is that the highest level governing body possesses the sole power to grant or deny tenure; all other administrative levels exercise a merely advisory role.[60] Thus, in *Bd. of Trust. of Com. Dist. No. 513 v. Krizek,*[61] the court held the board of trustees of a community college had statutory authority regarding tenure questions. Therefore, even statutorily or contractually mandated lower-level evaluations could not dilute that power, and lower-level recommendations placed no conditions on the trustees' authority.

In the unusual case of *Trojan v. Univ. Wis. Regents Bd.,*[62] however, the candidate's department voted against tenure, but was overridden by an appeals committee, the chancellor, and, finally, the board of regents. The department litigated to deny tenure, and the court found the relevant statute required tenure upon the affirmative recommendation of both the appropriate chancellor and academic department. The following limitation was thus placed on the regents' discretion: although the regents might freely disregard an affirmative faculty recommendation, they could not lawfully disregard a negative one.[63]

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[51] 249 S.E.2d at 925.

[52] 249 S.E.2d at 926.

[53] 249 S.E.2d at 926.

[54] 249 S.E.2d at 926.

[55] 768 F.2d 128 (7th Cir.1985).

[56] No. 89-10532 (2d Jud.Dist.N.M. Sept. 28, 1992) (currently on appeal).

[57] 841 P.2d 1168 [79 Ed.Law Rep. [290]] (Okl.App.1992).

[58] 841 P.2d at 1171-72.

[59] 841 P.2d at 1172.

[60] *See, e.g., Honore v. Douglas,* 833 F.2d 565, 568 (5th Cir.1987); *Erickson v. New York Law School,* 585 F.Supp. 209, 212 [17 Ed. Law Rep. [1096]] (S.D.N.Y.1984); *Amoss v. University of Washington,* 40 Wash.App. 666, 676, 700 P.2d 350, 359 (1985).

[61] 113 Ill.App.3d 222, 227, 68 Ill.Dec. 770, 773, 446 N.E.2d 941, 944 (1983).

[62] 128 Wis.2d 270, 382 N.W.2d 75 (1985).

Courts are divided on the question of whether the governing board may delegate its tenure authority. The preponderance of authority holds that the board may delegate both investigative and decision-making powers.[64] Arguments that the regents are obligated to conduct an independent review of university recommendations are therefore likely to fail.[65]

In some circumstances, however, courts have held that statutory language vesting promotion authority with a particular administrative body must be strictly construed. In *Faculty of City University v. Murphy,*[66] the court considered whether the board of trustees was required to review tenure applications of faculty whose applications were rejected by the university's chancellor. Although various administrative bodies, including the chancellor, had authority to review lower-level recommendations, the court held that only the trustees had statutory decision-making authority, and therefore a candidate who received a favorable recommendation at any level was entitled to trustees' review.[67]

Similarly, in *University of Hawaii Professional Assembly v. University of Hawaii,*[68] the court held the regents had contractually agreed to delegate tenure decisions to an arbitrator. Over the university's argument that the regents had exclusive statutory authority to confer tenure, the court held an arbitrator could substitute his or her judgment for that of the regents.

Procedures for granting tenure thus resemble criteria for granting tenure. Institutions enjoy great flexibility in their decision-making. Occasionally, however, a court is persuaded that an institution has violated a procedure arising from contract, statute, or the Constitution.

CONCLUSION

Parties in a dispute over promotion must consider the particular statutes and contracts governing their individual institutions. Although courts tend to construe such rules generously in favor of the institutions, the safer course is for institutions to follow the formal criteria and procedures.

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[63] 128 Wis.2d at 276–77, 382 N.W.2d at 78.

[64] *See, e.g., Abramson v. Board of Regents, University of Hawaii,* 56 Hawaii 680, 689, 548 P.2d 253, 259 (1976); *Smith v. Greene,* 86 Wash.2d 363, 372, 545 P.2d 550, 556 (1976).

[65] In a twist on the delegation question, it has been held that a dean had either apparent authority or the acquiescence of the regents in promising a professor tenure, and thus the dean was vested with authority to grant tenure despite a statute expressly granting tenure authority to the board of regents. *Harris v. Arizona Bd. of Regents,* 528 F.Supp. 987, 996–97 [2 Ed.Law Rep. [76]] (D.Ariz.1981).

[66] 149 A.D.2d 315, 316, 539 N.Y.S.2d 367, 368–69 [52 Ed.Law Rep. [1190]] (1989).

[67] *See also Rodriguez-Abad v. Kibee,* 71 A.D.2d 588, 589, 418 N.Y.S.2d 430, 431 (1979) (tenure committee may not delegate its authority to the chancellor).

[68] 66 Hawaii 214, 217–19, 659 P.2d 720, 723, 725 (1983).

Plaintiffs have the difficult burden of persuading courts not to defer to the asserted expertise of college administrators.[69] Plaintiffs will essentially need to argue that academic employers should be held to the same standards of reasonable conduct and contract construction that traditionally apply to other employers.

Colleges and universities will want to have available good-faith reasons for their actions, either in applying tenure standards or in deviating from established procedures. It should be noted that courts, even when persuaded to grant relief, are unwilling to grant plaintiffs tenure, preferring instead to give plaintiffs additional institutional review.[70] Far more threatening to an institution are the financial damages arising from a successful discrimination suit. Taking the time to follow written guidelines and document reasons for tenure decisions will serve academic administrators well.

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[69] *See* Barbara A. Lee, "Threshold Qualifications in Academic Discrimination Litigation," 30 Ed.Law Rep. [1] (1986).

[70] *See, e.g., Equal Employment Opportunity Com'n v. Tufts Inst.*, 421 F.Supp. 152, 165 (D.Mass.1975); *Smith v. Rainey*, 137 Ariz. 522, 523, 672 P.2d 187, 188 [14 Ed.Law Rep. [813]] (1983).

IV. MANAGING EMPLOYEE CONDUCT

78 Ed.Law Rep. 631

LIABILITY AND PENALTIES FOR SEXUAL HARASSMENT IN HIGHER EDUCATION *

by

JANE ELZA, PH.D.**

Sexual harassment remains one of the most difficult problems for higher education to deal with, particularly when it involves faculty/student relations.[1] Attention has again been focused on the issue in the wake of the Anita Hill/Clarence Thomas controversy. A Newsweek poll found 21% of women responding saying they had been harassed at work and 42% said they knew someone who had been harassed.[2] A 1980 University of Rhode Island survey received returns indicating that 58% of the students experienced sexual harassment involving grades for sexual contact. Michigan State University Student Affairs Office did a random sample of 998 students. Twenty-five per cent reported being sexually harassed within the last year, (1979.)[3]

The Supreme Court's decision in *Franklin v. Gwinnett County Public Schools,* — U.S. —, 112 S.Ct. 1028, 117 L.Ed.2d 208 [72 Ed.Law Rep. [32]] (1992), allowing students to sue if the institution did nothing in response to a known complaint, means schools will again re-evaluate their policies for dealing with sexual harassment problems. EEOC Guidelines, 29 CFR § 1604.11(f), 1980, state that

> Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

"Appropriate sanctions" are expected to serve as a deterrent and a remedy to sexual harassment, as well as to penalize. To avoid damage lawsuits, institutions may attempt to create a solution which places the victim in the situation she would have been in if the harassment had not taken place.[4] The sanction, in this circumstance, may be no more than a required apology from the professor to the student. It may, of course, be more, and therein lies the dilemma. For example, protection from liability may demand that a record be kept of the incident, even though no official action, other than a verbal warning, took place. It is possible that the accused harasser is not even contacted. Can or will that 'unofficial' record be used to deny raises or promotions or perks of the profession? Could a file of 'unofficial' complaints be prepared over the years without the professor's knowledge? Could that file be used to establish a pattern of harassment?

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* The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 78 Ed.Law Rep. [631] (Jan. 28, 1993).

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[1] Since most harassment involves male to female harassment, this paper treats the topic from that perspective. However, it is recognized that homosexual and female to male harassment occurs. The same legal principles apply, although public reaction may vary.

[2] "Striking a Nerve," *Newsweek,* October 21, (1991) at 34.

[3] Billie Wright Dzoch and Linda Weiner, *The Lecherous Professor: Sexual Harassment on Campus,* 2d ed. (Urbana, Illinois: University of Illinois Press, 1990) at 13.

In sexual harassment cases involving other employees, EEOC Guidelines state that the employer is legally liable if he/she "knew or should have known" of the conduct. The employer's defense is that he/she took "immediate and appropriate corrective action." The responsibility to take "immediate and appropriate corrective action" exists even when a formal complaint has not been filed. Combined with the obligation to affirmatively "take all steps necessary to prevent sexual harassment," the institution carries a heavy burden to make clear what type of behavior is illegal and what the consequences of engaging in that behavior are.

It is important to be clear about what sexual harassment is not. It is not synonymous with moral turpitude, immorality, unprofessional and/or unethical conduct, or sexual misconduct, all of which are separate grounds for dismissal in some colleges and universities. While sexual harassment may contain elements of each of these, it is the disparate power relationship that is the central focus.

In higher education, there is also another element present. Professors are expected to serve as role models for students and the community. Like policemen and doctors, they are never "off duty." This obligation extends to their private lifestyles. Good role models do not sexually exploit their students and such exploitation can be considered sexual harassment. In a 1971 case, involving a junior college teacher, a California appeals court summarized this position ". . . Certain professions . . . impose upon persons attracted to them, responsibilities and limitations on freedom of action which do not exist in regard to other callings. Public officials such as . . . school teachers fall into such a category. . . . The integrity of the educational system under which teachers wield considerable power in the grading of students and the granting or withholding of certificates and diplomas is clearly threatened when teachers become involved in relationships with students. . . ."[5]

The American Association of University Professors in its *Policy Documents and Reports*, 1990, states that "Faculty members are cautioned against entering romantic or sexual relationships with their students; so, too is a supervisor cautioned against entering such relationships with an employee. Faculty and staff should be cautious in assuming professional responsibilities for those with whom they have an existing romantic relationship." The threat to academic freedom is implicit in the relationship itself.[6] The professor's ability to be objective becomes questionable; the other students' perceptions of the course may alter; and the student involved may perceive the relationship as an opportunity to manipulate the professor.

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[4] Letter from Executive Secretary of Board of Regents, University of Georgia, April/May, 1989.

[5] *Board of Trustees of Compton Junior College District v. Stubblefield*, 16 Cal.App.3d 820, 93 Cal.Rptr. 318 (1971).

Where this special responsibility is specifically adopted by the school, the obligation is even heavier. In *Korf v. Ball State University,* 726 F.2d 1222 [16 Ed.Law Rep. [26]] (1984), a male professor was charged with harassing male students. Ball State had adopted the AAUP Statement on Professional Ethics and had published it in the faculty handbook. The Seventh Circuit Court of Appeals reasoned that a teacher was not like an ordinary "person on the street." The profession imposes concomitant ethical obligations, which any professor would know through common sense and good judgment.

SEXUAL HARASSMENT BETWEEN FACULTY AND STUDENTS

EEOC defines sexual harassment as follows:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical contact of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[7]

The first standard is generally understood to mean that a reward is offered for sexual contact and the second to mean that a penalty is imposed for refusal. The third standard, "creating an intimidating, hostile, or offensive working environment," is not as clear. It includes the posting of nude pictures that creates a "pre-existing atmosphere that deters women from entering or continuing in a profession or job. . . ."[8] A federal district court judge rejected the "ostrich defense" of a company, which claimed it was unaware of the women's complaints.[9]

In most cases, the conduct complained of has been repeated, intrusive, and unwelcome. In *Bundy v. Jackson,* the District of Columbia Circuit Court acknowledged that psychological and emotional work environment ". . . the sexual stereotyped insults and demeaning propositions . . . caused anxiety and debilitation" and ". . . illegally poised that environment."[10] Some of the actions considered to be harassment include derogatory remarks, requests for sexual favors, touching or fondling, sexual intercourse, and unprofessional activity. In the Florida case, the federal district court recognized that "nonprofessional ambience imposes much harsher effects on women than on men."[11] Verbal and physical intrusions which have the purpose or effect of

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6. *AAUP Policy Documents and Reports,* (Washington, D.C., 1990), at 114, n. 3.

7. 29 CFR § 1604.11(a) (1980).

8. *Robinson v. Jacksonville Shipyards, Inc.,* 760 F.Supp. 1486, 1523 (M.D.Fla.1991).

9. *Id.* at 1507.

10. *Bundy v. Jackson,* 641 F.2d 934 (DC Cir. 1981)

11. *Id.* at 1505.

unreasonably interfering with work performance can be considered harassment creating an offensive, hostile or intimidating environment. This can include defaming gossip, as well. In *Jew v. University of Iowa,* 749 F.Supp. 946 [64 Ed.Law Rep. [84]] (1990), the federal district court ruled that Dr. Jew had been defamed by gossip concerning an alleged relationship with the Chair of the Department of Anatomy. Her complaints, too, were ignored until she filed a complaint with the Equal Employment Opportunity Commission.[12]

The Supreme Court, in *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), has muddied the waters by declaring a distinction between "unwelcome" sexual advances and "voluntary" responses. In Meritor, the Court ruled that an institution was still liable for allowing a hostile environment even if the sexual relationship was "voluntary." Citing 29 CFR 1604.11(a) (1985), the Supreme Court stated:

> But the fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." While the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact, the District Court in this case erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.[13]

The Supreme Court offered no clear guidelines to the trier of fact to help distinguish between voluntariness and unwelcomeness. It suggested that provocative speech and dress may be relevant, but emphasized that the record as a whole and the totality of the circumstances must be considered.

For those who see this as an invitation to rejected girlfriends or disillusioned survivors of broken relationships to sue, the Supreme Court's probable response would be to have a little faith in the trier of fact. *Bougher v. University of Pittsburg,* 882 F.2d 74 [55 Ed.Law Rep. [395]] (3d Cir.1989) is an example of restraint in a case involving a complaint following the breakup of a seven year relationship. The former student complained about being stared at in public places in a manner which made her uncomfortable. The court of appeals found no violation of her rights, reasoning that the incidents took place long after the breakup and that the two crossed paths solely by chance.

It is possible that the Supreme Court's decisions in the school prayer cases can serve as a guide to distinguishing between voluntary and unwelcome.[14] The concept of students as a captive audience is useful. Even at the university level, the options available to avoid a professor, transfer out of his class, or otherwise avoid the unwelcome advances are limited. In an authoritarian environment, with the clear difference in power relationships, the burden of proof is on the institution to prove that the action was voluntary, not coerced. By focusing on unwelcomeness, the burden of proof is on the complainant to prove that she did not solicit the advances in some manner. Frequent refusals, observed body language, indications that the woman was uncomfortable or distressed by the actions could be considered by the trier of fact. Since students may interact socially with professors on the university level, it will be difficult for the jury or peer panel to determine at what point in this "involuntary" relationship, the professor's actions became "unwelcome." It is likely that the woman's mental state will become the pivotal issue.

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[12] *Jew v. University of Iowa,* 749 F.Supp. 946 [64 Ed.Law Rep. [84]] (M.D.Iowa 1990).

[13] *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 68, 106 S.Ct. 2309, 2406, 91 L.Ed.2d 49 (1986).

[14] *Engle v. Vitale,* 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962) and *School District of Abington v. Schempp,* 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) suggest that students are a captive audience whose

The standard used to determine a hostile work environment is that of the "reasonable woman."[15] This standard recognizes the differences in perceptions between men and women. What women perceive as friendly, men may see as sexy. Men are more likely than women to consider a woman at fault in a sexual harassment complaint.[16] Testifying in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486 (1991), Ms. K.C. Wagner, a self-employed consultant, stated that victims of sexual harassment respond according to their personalities, the expectation that the situation is resolvable, and the type of incident. Identifying five typical responses, she noted that filing a formal complaint is the least likely response because victims fear escalation of the problem, retaliation from the harasser, and embarrassment in reporting the incident. This last is complicated by the fear that nothing will be done.[17]

The activities and persons involved must be judged by college community standards, however.[18] In *Texton v. Hancock*, a Florida appeals court ruled that the professor's dismissal for immorality had to be judged by the "more liberal, open, robust college surroundings." This does not mean that any acts of consenting individuals will be approved by the courts. A balance must be struck between the individual's freedom and the institution's responsibility for the students and the educational process.[19]

Women may be discouraged from participating in class, may be rejected for research assignments because of "masculine" traits, and may be treated less seriously than men by higher education.[20] It is important to remember,

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independence is curtailed. The obligation of the school not to impose religious values increases with the malleability of the child.

[15] Robert J. Shoop, "The Reasonable Woman in a Hostile Work Environment" 72 Ed.Law Rep. [703, 710] (April 23, 1992).

[16] *Id.* at [709].

[17] *Id.* 760 F.Supp. at 1506. The five responses listed by Ms. Wagner are: 1. denying the impact of the event, blocking it out; 2. avoiding the workplace or harasser; 3. telling the harasser to stop; 4. joking or bantering to defuse the situation; and 5. threatening to make or making an informal or formal complaint.

[18] *Texton v. Hancock*, 359 So.2d 895, 897 (Fla.App.1978).

[19] Joseph C. Beckham, *Faculty/Staff Nonrenewal and Dismissal for Cause in Institutions of Higher Education* (Ashville, N.C., College Administration Publications, Inc., 1990) at 24.

[20] "The Classroom climate: A Chilly One for Women," The Project on the Status and Education of Women, Washington, D.C. at 7, 8.

however, that sexual harassment involves sex as it is commonly understood in everyday communication. Creating a hostile environment means the professor has used sex as a way of asserting his power, his actions intimidating because of his position.

It is, of course, a wise policy to take steps so liability does not occur. Attorney Barbara Berish Brown, at a speech at a BNA co-sponsored conference, stated that *Paroline v. Unisys Corp.*, 879 F.2d 100 (1989) has indicated the actions an employer must take which are "likely to ensure" winning a sexual harassment case. These actions include investigating the complaint, issuing a written warning to the harasser, requiring counseling for the complainant and/or the alleged harasser, withholding scheduled promotions and pay raises, limiting contact between alleged harasser and complainant, and asking the complainant not to quit the job. The cases we have reviewed above suggest that the employer must make a good faith effort to respond to the complaints quickly, even if the complainant does not file a formal complaint.[21]

VARIABLE PENALTIES

It has been suggested that institutions establish a range of disciplinary actions to deal with sexual harassment. Mild discipline would include discussion with the offending employee, informing him of stated policy and indicating that the action should stop. A letter concerning the conversation would not be placed in the employee's file, but would be kept by the administrator.[22] It is possible that counseling, sensitivity training, warnings that the behavior could affect merit raises, and transfers to other duties could be used here.

In *Bell v. St. Regis Paper Co.*, 425 F.Supp. 1126, 16 BNA FEP Cas. 1429 (1976), an employer was held not responsible for sexual harassment of a female employee when he responded to the complaint by holding meetings with the employee and the alleged harasser, posting policy standards and hiring an independent expert to offer advice, which the company took. It is clear that preventative and remedial measures, such as workshops, publicizing the antiharassment policies, memos calling attention to the consequences of engaging in such behavior, and assistance to the complainant would also be considered sufficient responses.

The professor's special responsibility should be kept in mind here. Continuing to allow a professor to stay in a classroom once a charge of sexual harassment is made, however informally, opens the door to charges of a hostile environment from students who have observed his conduct and to future charges of not responding in a timely and appropriate manner.[23] The options of an educational institution may, however, be limited. In *Managing Faculty Disputes*, the authors state:

> Progressive discipline, as exercised in industry through warnings, suspension, transfer, discharge, or loss of benefits, is hardly applicable when

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[21] Susan L. Webb, *The Webb Report*, April, 1991 at 3, 4.

[22] Susan L. Webb, *The Webb Report*, March, 1991 at 7, 8.

[23] 45A *Am Jur 2d* Job Discrimination Sec. 790 (1985).

students in the classroom depend on continuing competent instructors to meet requirements for advancement, graduation, and professional examinations. Thus, for example, it may be unreasonable, if not impossible, to remove a professor temporarily during a semester or to assign a faculty member to a lower position.[24]

The action taken must be designed to prevent the conduct from occurring again. It is possible that the investigator would conclude that the professor's actions were the result of a sexual compulsion, which has been recognized as a disease. The administration may require that the professor receive treatment.[25] Procedures similar to those used for voluntary disclosure of drug use could be used in the pre-formal process stage. It should be noted that some states provide that no statement made to the employer in regard to the voluntary drug disclosure policy can be used as evidence against the employee in a civil or criminal proceeding.

In business, moderate discipline might include a written notice to the offending employee formally warning him that severe penalties will follow if the behavior continues.[26] The employee could be placed on probation with access to students limited. In academe, the employee's challenge to this discipline would have to be handled through due process procedures if the penalties changed the terms of his employment, denied him a property right, or violated the policies of the university. It should be noted that a formal reprimand resolves the issue, but a warning, in effect, puts the professor on probation. His behavior will be monitored for a stated period. AAUP recommends that a faculty member be able to petition a faculty review committee if he/she believes any penalty was unjustly imposed.[27]

More severe discipline could include suspension, demotion, permanent transfer, or dismissal. Demotion cases involve the transfer from administrative to teaching positions. Most are like *Johnson v. San Jacinto*, 498 F.Supp. 555 (S.D.Texas 1980), in which Johnson was removed as a registrar for having an affair with a librarian. He retained the salary of the registrar for the first year, but did not receive the raises administrators received and, thus, fell behind in salary. Transfers from one department to another have not involved egregious reassignments in that the person transferred had the ability or credentials to do the job. Typical would be *Maples v. Martin*, 858 F.2d 1546 (11th Cir.1988), a nonharassment case, in which a professor was transferred from the Mechanical Engineering Department to another engineering department at Auburn. This was not considered a demotion because the Eleventh Circuit court saw no stigmatising change.[28]

Due process procedures would, of course, be initiated before final action was taken. Peer review is necessary to prevent abuse and it is important that the university treat sexual harassment charges seriously. Most serious complaints are settled by the accused harasser resigning.

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[24] Janet McCarthy, Irving Ladimer, Josef Sirefman, *Managing Faculty Disputes* (San Francisco: Jossey-Bass Publishers, 1984) at 41.

[25] *Id.* at 35, 36.

[26] The Project on the Status and Education of Women suggests that the woman write a letter to the faculty member. This letter could be considered due notice that the behavior is offensive and the usual response to it is that the professor's behavior changes.

[27] *Ibid* at 115, n. 6.

[28] *Maples v. Martin*, 858 F.2d 1546, 1550 [49 Ed.Rep. [529]] (11th Cir., 1988).

AAUP *Policy Document and Reports,* 1990 edition, discusses three basic penalties for sexual harassment offenses: termination, suspension, and reprimand.[29] While the wording of the standard uses these sanctions only as examples, no other penalties are discussed anywhere in the *Policy Document.* This is due, in part, to the hope that corrective measures were taken during the mediation stage and that formal hearings, with attendant penalties, would be used only when mediation had failed. Any penalty resulting from mediation would be mutually agreed to and would not require the invocation of formal due process procedures.

The general assumption is that termination will be used for the most blatant examples of sexual harassment since they directly and substantially affect the fitness of the faculty member to teach, while suspension, with or without pay, would be reserved for occurrences with "mitigating" circumstances. AAUP does not recommend additional penalties, such as counseling, sensitivity training, demotion, or pay cuts, at this stage, unless, of course, they are mutually agreed upon by the parties. It is expected that formal due process procedures will be initiated only when communication has broken down or positions have hardened against a compromise.

Peer review panels have recommended additional penalties. The most publicized of recent cases involved the resignation of Dr. Frances Conley from Stanford University. Her resignation and formal complaint to EEOC led to an investigation by the University. This investigation led to the accused harasser being demoted from the position of acting department chair and agreeing to undergo gender sensitivity training. Dr. Conley has since returned to Stanford. It should be noted, however, that the former chair did not admit wrongdoing nor did he challenge the panel's recommendations in court. Those cases involving professors and students that have reached the courts have dealt with either suspension or termination and none of the education cases I have been able to find suggested alternative punishments. There appears to be a consensus that if sexual harassment occurred and due process was followed, termination is the appropriate penalty. At least, I could find no other penalty imposed for those cases that went to court. It is possible that those receiving lesser penalties did not challenge them in court.

CONCLUSIONS

Authorities agree that employers must spell out clearly what actions contribute to a hostile environment, as well as the penalties involved.[30] This obligation has become even more important since the Supreme Court's decision in *Franklin v. Gwinnett County Schools,* — U.S. —, 112 S.Ct. 1028, 117 L.Ed.2d 208 [72 Ed.Law Rep. [32]] (1992). For institutions of higher education, that may mean taking a stand on faculty/student dating and developing a clear procedure for dealing with anonymous or nonspecific complaints. Universities would have to publicize the procedures for dealing with complaints and clearly spell out the possible penalties/remedies that would be appropriate at each stage of the process. However, hearing panels would still be required to look at the totality of the evidence and a list of penalties or actions would probably not be accepted by a court as definitive, but as a guide to determine if proper procedures were followed and the proper penalty applied.

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[29] *Id.* at 115.

[30] Ralph D. Mawsley and Frederick M. Hampton, "Sexual Misconduct By School Employees Involving Students," 73 Ed.Law Rep. [883 at 884] (1992), and Dayle Nolan, "Sexual Harassment in Public and Private Employment," 3 Ed.Law Rep. [227, 236] (1982).

Penalties available to private industry are not readily adaptable to education. Tenured professors may see even the requirement of an apology to be an alteration in their job description and invoke grievance procedures. (Courts generally have held that "reasonable" requirements by administrators are legal and refusal could be interpreted as insubordination, a terminating offense in some jurisdictions.)[31]

Promotion decisions are supposed to be made on merit, according to stated criteria. One novel approach could be to assume that sexual harassment is an abrogation of the employment contract. Implicit in the contract is the professor's position as role model and his promise not to violate the policies of the university. Nonviolation of those policies would be a part of the promotion and tenure criteria. This would allow "demotion" after due process hearings determine a violation.

In *Johnson v. San Jacinto*, 498 F.Supp. 555 (S.D.Texas 1980),[32] the district court defined "demotion" as "any reassignment under which the staff member receives less pay or has less responsibility than under the assignment he held previously, or which requires a lesser degree of skill than did the assignment he had previously." Responsibility is the key to 'demotions.' It is not always clear that a full professor has more actual responsibility than an associate professor. In small colleges, rank may not be important and demotion would be considered no more than a slap on the wrist, especially if no reduction in pay was allowed.

Demotion cases have involved transferring administrators to teaching positions, rather than a reduction in academic rank, and reductions in pay have been the result of moving from twelve month to nine month contracts or the disparity of pay between faculty and administrators.

Civil liberties issues arise whenever any criteria other than academic merit is used for promotion and tenure decisions. At the same time, allowing someone who has engaged in sexual relations with student(s) and has been judged violative of the sexual harassment policies of his institution by peer review to continue teaching is to open the university to liability should another incident occur. Even if formal due process is not invoked, the university may be liable if it has knowledge that the employee had harassed or been accused of harassing others when a formal complaint is filed and did not take action reasonably designed to prevent such harassment. As the Fourth Circuit Court said in *Paroline v. Unisys Corp.*, 879 F.2d 100 (1989),

> An employer's knowledge that a male worker has previously harassed female employees other than the plaintiff will often prove highly relevant

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[31] Beckman, at 21.

[32] *Johnson v. San Jacinto Junior College*, 498 F.Supp. 555, 567 (S.D.Texas, 1980).

> in deciding whether the employer should have anticipated that the plaintiff too would become a victim of the male employee's harassing conduct.[33]

Any punishment or remedy devised by the institution should have as its clear intent the prevention of future harassing conduct. Institutions, however, have another obligation: to clarify the rights of the accuser and accused. These rights include more than knowing how to file a complaint or identifying who is responsible for complaint investigations. No file on any professor should be kept without his knowledge or access to it for review purposes, for example. At the same time, the institution may have promised to protect the identity of a complainant. AAUP recommends that the initial discussion with the grievance officer should be kept confidential, with no written record.[34] If the Gwinnett decision does nothing else, it will force universities to face these issues squarely.

In an attempt to deal with both the civil liberties issues and the sexual harassment issues, Harvard University's Faculty Council adopted a definition of sexual harassment which equates it with unprofessional behavior and established three methods for dealing with complaints. The complainant selects the appropriate process. These procedures include using the Assistant Dean or the Director of the Office of Student Affairs of GSAS to serve as mediator. This is the most informal of procedures and may involve no more than an apology or reassignment of the student.[35]

A student may seek disciplinary action by the Dean of the Faculty in the second level process. This disciplinary action, presumably, would include warnings, sensitivity training, possible reassignment, and/or reprimands. Faculty review would not be available at this stage and the complaint is considered an administrative responsibility. The proceedings are confidential, but may generate a more public response, *i.e.* faculty workshops, general informative memos, and a clarification of policies.

Faculty review occurs in the third process. This is invoked when grounds for termination apply, although this may not be the only penalty. Harvard allows for deprivation of tenure.[36]

Harvard's approach is only one example of an institution's response, but institutions which wish to forestall law suits in the wake of Gwinnett may be advised to:

1. Adopt a position on faculty/student amorous relationships in an ethics document, statement of policy, resolution of faculty senate, and/or inclusion of AAUP *Policies* in faculty handbooks. This would have to include a statement on consensual relationships.

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[33] *Paroline v. Unisys Corp.*, 879 F.2d 100, 107 (4th Cir.Va.1989).

[34] *Ibid.* at 114.

[35] Harvard has a policy which allows the Administrative Board of Harvard, which includes faculty, to change grades of students from a letter grade to pass/fail upon petition. An administrative change of a grade is very controversial. Institutions should take care that a person competent in the subject review the material before substituting another grade which would give the student academic credit in the class.

[36] Letter from Arts and Sciences Dean, Dr. Henry Rosovsky, reprinted by the Project on the Status and Education of Women, January, 1984.

2. State clearly how complaints that do not lead to peer review be handled and by whom. Implicit in this is an understanding of which types of behavior are covered and what penalties and/or remedies may be applied. There may or may not be an appeal to a grievance panel, depending upon the severity of the penalty or if the professor does not consider that the proper procedure was followed. The authority of this panel may or may not be limited to due process claims.

3. Actively educate their faculty, staff, and students concerning sexual harassment. Passive support such as the posting of bulletins, publishing complaint processes, making public statements, can be considered the least an institution can do.

4. Follow up the complaint in some manner and keep a record of the response, even if the result is negative. A record of an unfounded complaint protects the professor just as a record of misunderstanding between student and professor protects the institution. Both parties concerned should be allowed to know what is included in the report, but students' names may be deleted if communication between student and professor cannot be facilitated.

The Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*, —— U.S. ——, 112 S.Ct. 1028, 117 L.Ed.2d 208 [72 Ed.Law Rep. [32]] (1992), means schools will be reviewing their sexual harassment policies. Franklin demands that appropriate action be taken in response to a complaint. In higher education, that raises the question of what an appropriate response is and whether the complaint must be formal. In light of Franklin, it is recommended that all complaints, formal or informal, be investigated to avoid future liability.

While higher education's liability may be the same as any employer's, the methods of response cannot be the same. Tenure, the 'informality' of teacher/student relations, the lack of a clear chain of command, and the special obligation of teachers to serve as role models influence what response is considered appropriate. Doing nothing, however, is no longer an option.

These recommendations will go a long way toward protecting the institution from losing law suits. They should, also, help eliminate sexual harassment in the workplace, but they raise civil liberties issues which have not been fully addressed by professors, administrators, or the courts.

Internal Sexual Harassment Complaints: Investigating To Win

JAMES J. OH

In a sexual harassment lawsuit, a company has a unique opportunity to avoid liability if it can prove that, when the sexual harassment complaint arose internally, the company promptly investigated the complaint and implemented corrective action to prevent the harassment from occurring again. This is a how-to article: how to investigate a complaint of sexual harassment in order to limit or even eliminate the company's liability in a lawsuit brought either by the alleged victim or alleged perpetrator of the sexual harassment.

Employers received mixed news from the United States Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), regarding their liability in sexual harassment cases. On the downside for employers, the Supreme Court approved the "hostile working environment" theory of sexual harassment and concluded that even if a plaintiff engages in consensual sexual relations with the alleged perpetrator of sexual harassment,[1] she still may have a viable sexual harassment claim if she can prove that the sexual advances were unwelcome. On the upside for employers, the Supreme Court concluded that employers are no longer to be held automatically liable for sexual harassment by their supervisory employees.

The federal courts have interpreted the favorable aspect of the *Vinson* decision to mean that an employer may avoid liability for sexual harassment by a supervisor or co-worker if, once it knows or should have known about sexually harassing conduct, it takes prompt remedial action which is "reasonably calculated to prevent further harassment under the particular facts and circumstances of the case at the time the allegations are made."[2]

To avoid or limit liability, companies should immediately investigate each sexual harassment complaint that arises internally and determine what, if any, corrective action should be taken. Not only is it the right thing to do, but also, a prompt, fair and thorough investigation of the complaint, followed by measures to prevent any further harassment from occurring, can limit, even eliminate, the

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company's liability in a subsequent sexual harassment lawsuit. The Civil Rights Act of 1991 has dramatically increased the importance of effective internal investigations of sexual harassment complaints and effective remedial measures to prevent further harassment because, under the new law, companies now face jury trials and can be held liable for compensatory and punitive damages in sexual harassment lawsuits.[3]

While investigating the complaint, however, companies must be careful to guard against a lawsuit from the perpetrator of the sexual harassment. The perpetrator may claim that the investigators or victim defamed him by making groundless allegations of sexual harassment, or that the investigators intentionally inflicted emotional distress on him during the investigation, or that the company conducted an unfair and biased or discriminatory investigation against him in contravention of company policy or antidiscrimination laws.

This article provides a step-by-step analysis of the sexual harassment complaint investigation. It offers practical guidance to the company officials responsible for investigating the complaint on what to do at each stage of the investigation. (See the checklist on pp. 230 and 231.) Although the emphasis is practical, the theme is legal: how to conduct an investigation in a manner that limits or avoids liability in a subsequent lawsuit filed by either the victim or perpetrator of the harassment.

PRELIMINARY CONSIDERATIONS

The investigation generally consists of two stages: (1) gathering the facts and (2) evaluating the facts and making a decision as to the appropriate corrective action, if any, to take. The first stage consists primarily of interviewing all witnesses to the alleged harassment: the victim, the perpetrator, and any corroboration witnesses. The second part consists of evaluating the evidence, drafting a report, and deciding the appropriate corrective action for the situation.

Each time that a sexual harassment complaint arises, no matter how minor, a company should immediately begin to investigate, *ideally within twenty-four hours of receiving notice of the complaint.* A failure to act quickly on a complaint diminishes the company's chances of avoiding liability in a subsequent sexual harassment lawsuit.[4]

There are three things a company should consider before beginning interviews of witnesses.

Use Two Unbiased Investigators

When investigating the complaint, the company, if possible, should use two investigators to conduct the interviews.[5] Using two investigators has the following benefits.

First, each investigator can act as a check on the other's conduct during the investigation, to ensure that neither gets too zealous or aggressive during an interview.

Second, if either the victim or perpetrator sues the company, the two investigators can corroborate each other's testimony at trial. The corroborated testimony of two investigators will be more persuasive to a judge and jury than the uncorroborated testimony of one investigator.

Third, using two investigators is a more reliable way to gather the facts. During an interview, it is difficult to ask questions and take notes at the same time. Responses to questions will likely be missed and/or forgotten because the single investigator did not have the time to write it down. If two company representatives conduct the interviews, one person can be assigned the role of principal interrogator and the other the role of principal note-taker.

Finally, a jury in a subsequent lawsuit brought by either the victim or perpetrator will be more comfortable with the collective decision of two investigators than the unilateral decision of one investigator.

Neither of the investigators should be susceptible to accusations of bias due to past dealings with either the victim or perpetrator. In a recent case, a former supervisor who was discharged after charges of sexual harassment were made against him brought suit against the company, claiming that the company had not conducted a fair and unbiased investigation as was mandated by the company's own policies. The supervisor claimed that the person who conducted the investigation had a grudge against him because the supervisor had embarrassed the investigator by proving him wrong on two previous occasions. Although the court was troubled by the plaintiff's allegations,[6] the defendant ultimately prevailed because the plaintiff, an at-will employee, failed to prove his discharge violated public policy.

To avoid the trouble and expense of a similar claim, the two investigators should, once they learn the identity of the victim and perpetrator, examine any past dealings they may have had with both. If either investigator could be accused of being prejudiced against either the victim or perpetrator, the investigator should consider recusing him or herself from participating in the investigation.[7]

Create a Confidential File

The investigators should create a separate, confidential file on the investigation. The file will eventually contain the investigators' notes, the signed original and copies of any statements that are taken, the

Checklist for Sexual Harassment Investigations

I. PRELIMINARY CONSIDERATIONS
  A. Use two investigators, if possible.
  B. Create a confidential file.
  C. Conduct interviews in a private room.

II. GATHERING THE FACTS
  A. Review relevant personnel files and company policies.
  B. Interview the victim.
    1. Take her complaint seriously.
    2. Explain the investigation but don't promise complete confidentiality.
    3. Find out what happened: GET SPECIFICS.
    4. Find out the effect of the harassment on the victim.
    5. Find out names of witnesses.
    6. Ask the victim what she wants.
    7. Assess her credibility.
    8. Take a statement, if warranted.
    9. Type the notes of the interview.
  C. Interview the perpetrator.
    1. Explain the purpose of the interview but state that no decision has been made on the truthfulness of the allegations.
    2. Identify the victim and the specific basis of the sexual harassment complaint.
    3. Ask him to respond to the charges.
    4. Find out names of witnesses.
    5. Assess his credibility.
    6. Take a statement, if warranted.
    7. Type the notes of the interview.
  D. Interview corroboration witnesses.
    1. Try to elicit identity of victim and perpetrator from the witness as opposed to identifying the victim and perpetrator to the witness at the beginning of the interview.
    2. Find out what he or she knows: GET SPECIFICS.
    3. Distinguish between firsthand and secondhand knowledge.
    4. Assess the credibility of the witness.
    5. Take a statement, if warranted.
    6. Type the notes of the interview.

BEST COPY AVAILABLE

Checklist for Sexual Harassment Investigations (con.)

III. EVALUATING THE FACTS AND MAKING THE DECISION
   A. Evaluate the facts from a reasonable woman's perspective.
   B. Distinguish between "unwelcome" and "voluntary" sexual conduct.
   C. Draft a thorough, even-handed report.
      1. Make the report chronological.
      2. Describe when first learned of the complaint.
      3. Provide exact details of the complaint.
      4. Note the documents reviewed.
      5. Describe the interviews.
      6. For all witnesses, distinguish between firsthand knowledge and rumor.
      7. State conclusion as to whether sexual harassment occurred and provide specific justification.
      8. Recommend corrective action if sexual harassment occurred. The corrective action should:
         a. be reasonably calculated to prevent further harassment;
         b. not punish the victim;
         c. be consistent with the discipline imposed in the past in similar situations.
   D. Submit the report to the decision-making official. That official should:
      1. not be a rubber stamp;
      2. point out deficiencies in the report;
      3. ask follow-up questions;
      4. conduct interviews him or herself if necessary;
      5. document his or her actions.
   E. Follow up with the victim and perpetrator after the decision has been made.

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signed original and copies of the report that will be drafted summarizing the investigation, and documentation of any disciplinary action taken.

Because the contents of the file will likely be discoverable in subsequent litigation, the investigators should not write derogatory editorial comments or state personal opinions about, for example, a person's integrity or reputation, when taking notes during an interview. Such statements would hurt the company in a defamation lawsuit.

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To prevent leaks and reduce the risk of a defamation lawsuit, the investigators should try to type everything themselves during the investigation and avoid using support staff to type, copy, file, or deliver documents related to the investigation. Inter-office mail should be avoided. Instead, the investigators should hand-deliver, if possible, copies of their report to whomever needs to see it. After the investigation, one of the investigators should keep the file in a safe, private place to which other employees do not have access.

Pick a Room That Will Ensure Privacy

The interviews should be conducted in a room that can ensure privacy. If possible, the interviews should be conducted in a room that does not have windows. Some of the interviews could get emotional, and people who walk by will wonder what the meeting is about. The room should also be as soundproof as possible. People can hear, or claim they heard, entire conversations through walls and closed doors.

GATHERING THE FACTS

In the fact-gathering stage of the investigation, the investigators should be as thorough and as expeditious as possible. The more thorough the investigators are, the more informed a decision they will make and the better chance they will have to avoid liability in a subsequent lawsuit. The more expeditious they are, the less time that the victim will be exposed to possible further harassment.

The company investigators should do the following during this stage of the investigation:

Review Relevant Personnel Files and Company Policies

Before conducting interviews, the investigators should review both the victim's and the perpetrator's personnel files to glean any useful information for their interviews. If the perpetrator supervises the victim, the personnel files may reveal recent complaints about the supervisor from the subordinate or recent criticism of the subordinate by the supervisor.

The investigators should also review the company's sexual harassment policy and applicable provisions of the employee handbook, if any. Any mandated procedures in those documents should be followed, or the company may face a breach of implied contract lawsuit upon completion of the investigation.

Finally, to refresh themselves on the law of sexual harassment, the investigators should review the EEOC's Policy Guidance on Sexual Harassment, issued in March 1990.

The investigators should document their review of relevant personnel files, company policies, and the EEOC Policy Guidance to demonstrate the thoroughness and conscientiousness of their investigation.

Interview the Victim

The investigators should make a few preliminary remarks before questioning the victim about her complaint. First, the investigators should inform her that the company takes each and every complaint of sexual harassment seriously, that her complaint will be taken seriously, and that her complaint will be thoroughly investigated. The victim of sexual harassment has already made a very tough decision—whether or not to come forward with her complaint. By giving the impression that they are not taking her allegations seriously, the investigators will only make a bad situation worse. They will make an angry person angrier, make her believe that her complaint is not being adequately addressed, and thereby increase the chance that she will resort to litigation to redress her situation.

The investigators should also explain what the investigation will involve, namely interviews of the perpetrator(s) and other witnesses who are identified during the investigation. They should inform her that a written report to the senior decision-making official will be prepared with a recommendation of corrective action, if any.

The investigators should also explain that they will do their best to limit who knows about the complaint and investigation. *The investigators should not, because they cannot, promise complete confidentiality.*

After making these introductory remarks, the investigators' job is, of course, to find out what happened. Open-ended questions should be asked: What is her complaint? What happened? Where did it happen? Who was involved? When? How many times? How did you respond each time? Was his conduct unwelcome? Did you tell him that the conduct was unwelcome? Who saw or heard what happened? What documentary evidence or other evidence does she have? Did she tell anyone about the incidents? Whom did she tell? The victim should not be allowed to be vague. If she says that the perpetrator made vulgar and crude remarks to her, the investigators should find out exactly what he said to her, when, where, how many times, and so on.

After finding out what happened, the investigators should find out what effect the conduct had on the victim. How did she feel when he made the vulgar remarks? When she says she was upset, what does she mean by upset? Was she depressed? Did she cry? Did she miss any days from work? Has she seen a doctor? For what? Does she have documentation of her visits to the doctor? Did insurance cover the visits to the doctor? Has her work been affected? How? Has she spoken to anyone about how she has been feeling after the incidents?

The investigators should also ask the victim what she wants. How does she want the situation handled or resolved? What assistance can the company provide? Does she want to use the Employee Assistance Program?

Throughout the interview, the investigators should view the victim's demeanor during the interview and make an assessment of her credibility. How did she appear during the interview? Did she sound believable? Would a jury believe her story? Or, does the story sound fabricated? What motive would she have to lie?

The investigators should document any refusal by the victim to divulge information such as the specific basis of her complaint or the identity of potential witnesses. This will protect the company if the victim later claims that her complaint was not fully and adequately investigated.[8]

Immediately after the interview of the victim, the investigators should type up their notes while the interview is fresh in their minds. This review of their notes may spark some follow-up questions to ask the victim and help the investigators formulate questions to ask the perpetrator.

The investigators should also discuss whether they should take a statement from the victim and any of the future witnesses. The value of a statement, if it is well-written, is that it locks the witness into a story. Later, if he or she changes the story, the statement can be used to impeach his or her credibility. In addition, a statement is valuable if the witness might be unavailable later. Because the statements may be pivotal in subsequent litigation, they should be concise and specific. The statements should not be vague or allow the witness to maneuver away from what he or she said in the statement.

Interview the Perpetrator

At the start, the investigators should explain that the purpose of the meeting is to investigate a complaint of sexual harassment that has been made against him. The perpetrator should be informed that the company takes each and every allegation of sexual harassment seriously, that each complaint of sexual harassment is fully investigated, that no decision has been made on the truthfulness of the allegations, and that the purpose of the interview is to give him an opportunity to respond to the complaint.

After these preliminary remarks, the investigators should identify the victim and tell the perpetrator the specific basis of the sexual harassment complaint against him.[9] The investigators should also warn the perpetrator that the victim should not be retaliated against in any way and that any reprisal against her will not be tolerated. Further, the perpetrator should be informed that any witnesses who cooperate in the investigation are also protected from reprisal. These warnings are especially important to make when the perpetrator is the victim's supervisor and/or the supervisor of any of the witnesses.

The perpetrator should then be asked to respond to the charges. The investigators' follow-up questions will, of course, depend on the perpetrator's response to the allegations. If, for example, the victim claimed that the perpetrator made sexual advances, and the perpetrator flatly denies the allegations, the investigators should ask why the perpetrator believes the victim made the complaint against him. Or, if the perpetrator admits to making sexual advances, the investigators should ask him if he believed the victim welcomed his conduct or if the victim indicated to him that the advances were unwelcome. The perpetrator also should be asked whom the investigators should interview to corroborate his story. Throughout the interview, the investigators should pay careful attention to the perpetrator's demeanor and note whether he displayed any emotion such as shock, disbelief, anger, or remorse.

If the perpetrator refuses to cooperate with the investigators, the refusal to cooperate should be documented and the perpetrator reminded that he could be disciplined, up to and including discharge, if he refuses to cooperate. Further, if the perpetrator requests an attorney, the investigators should refuse the request, unless the perpetrator is a government employee,[10] and state that the investigation is strictly an internal company matter and that no counsel needs to get involved. A lawyer will only make the interview more adversarial and will restrict the amount of information that the investigators glean from the perpetrator.

After the interview, the investigators should type their notes of the interview. They should identify areas of agreement and areas of conflict between the victim's and perpetrator's stories. The investigators should also determine follow-up questions to ask the victim.

The investigators should then plan the interviews of witnesses identified by the victim and perpetrator. If neither has identified any witnesses, the investigators should determine who works in the same department(s) as both, or who works in close proximity to both, and interview them for corroborating evidence. For example, the investigators should interview both the victim's and perpetrator's direct supervisors. In addition to providing corroborating evidence, the supervisors may have knowledge about discipline problems, a past or present relationship between the victim and perpetrator, or previous complaints of sexual harassment by the victim or against the perpetrator.

Interview Corroboration Witnesses

When beginning the interview, the witness should be informed that the company is investigating a complaint of sexual harassment. ***In the opening remarks, neither the victim nor the perpetrator should be identified.*** The witness should also be informed that it is illegal to retaliate against anyone for cooperating in an investigation of such a complaint and that any reprisal against the witness will not be tolerated. If the witness feels that, after the interview, he or she has been retaliated against in any way, the witness should be told to contact the investigators, who will take appropriate action.

The first question to a corroboration witness should be phrased in a general manner. Have you observed any conduct at the company that you would consider to be sexually harassing? If the witness answers yes, then the witness should be asked who the perpetrator and victim of the harassment were. The witness hopefully will identify the perpetrator and victim who are the subject of the instant investigation.[11] By getting the witness to identify who the perpetrator and victim are, the investigators can truthfully testify in a subsequent defamation lawsuit filed by the perpetrator that they did not reveal his identity to the witness. Instead, the witness offered his identity to them. The investigators then should elicit details from the witness. What did he or she see or hear? When? Where? How many times?

If the witness does not volunteer any information, then the next step should be to identify the victim and ask the witness if he or she has observed any sexual harassment of her by anyone at the company. If the witness answers yes, then the witness should be asked whom did he or she observe commit the harassment. The details of what the witness observed should be elicited, even if the witness refuses to identify the perpetrator.

When interviewing corroboration witnesses, the investigators should be careful to distinguish between what the witness actually observed—that is, the witness's firsthand knowledge—as opposed to what the witness learned through talking to someone—that is, secondhand knowledge, rumor, or gossip. If the witness knows something about the sexual harassment complaint only because he or she learned about what happened through someone else, the identity of that other person should be discovered and that person questioned.

Finally, the investigators should view the credibility of the witness and determine if the witness has any motivation to lie.

After all witnesses have been interviewed, the investigators should type their notes and determine if any follow-up questions should be asked of the victim, perpetrator, and anyone else interviewed.

EVALUATING THE FACTS AND MAKING THE DECISION

Now comes the hard part of the investigation: evaluating the facts in a written report and making decisions on whether sexual harassment occurred and whether corrective action should be taken.

Evaluate the Facts from a Reasonable Woman Perspective

As evaluators of the facts, investigators of sexual harassment claims should understand a developing trend in the law to view the facts in a sexual harassment case from the *victim's* perspective, that is, from the perspective of a "reasonable woman" as opposed to the perspective of a "reasonable person."

The reasonable woman standard recognizes that men and women have different perspectives on what may be objectionable and offensive conduct. As one court put it, "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[12] For example, a man might believe that he is merely being complimentary when he tells a woman that she has nice legs. The woman, however, may find such a comment offensive.

Further, "because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to a violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive." Thus, "if [employers] only examined whether a reasonable person would engage in allegedly harassing conduct, [they] would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy."[13]

Investigators of sexual harassment claims in jurisdictions that have adopted the reasonable woman (or victim) standard *must* view the facts from the victim's perspective because they are bound by the court decisions.[14] Companies in other jurisdictions, however, should also use a reasonable woman standard in both investigating sexual harassment complaints and training employees about the law of sexual harassment. Utilization of this standard in sexual harassment complaint investigations should have a deterrent effect on potential perpetrators of sexual harassment because, under this standard, they are more likely to be found guilty of sexual harassment and subjected to disciplinary action than under a reasonable person standard. In addition, training employees to view sexually harassing conduct from the victim's perspective will increase their sensitivity to what women consider to be offensive and threatening conduct.

When evaluating the facts from the victim's perspective, the investigators should also distinguish between "unwelcome" and "voluntary" sexual conduct. What if, during the interviews, the investigators uncover a history of sexual relations between the victim and perpetrator? As the Supreme Court noted in *Vinson*, the proper inquiry in a sexual harassment case is not whether the victim "voluntarily" had sexual relations with the perpetrator, but rather, whether the sexual advances were "unwelcome."

In *Vinson*, the district court initially decided the case against Mechelle Vinson, the victim, because she admittedly had intercourse with the perpetrator forty or fifty times during a several-year period. Vinson claimed, however, that she had sexual relations with her boss because she feared losing her job. The district court decided that the "relationship was a *voluntary* one having nothing to do with her continued employment . . . " and denied her sexual harassment claim. (Emphasis added.)

The Supreme Court reversed the district court, holding that "the fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" In other words, a woman who has had sexual relations with the alleged perpetrator does not have to prove that she was raped in order to have a viable sexual harassment claim.[15]

Draft a Thorough, Even-Handed, Concise Report

After the facts have been gathered, the investigators should draft a written report of their investigation to the vice president of human resources. The report should be chronological and generally should include the following.

First, the investigators should describe how they first learned of the complaint and when. This information is important to protect the company from a charge that the company did not act quickly on the complaint.

Next, the investigators should provide the exact details of the complaint. If the victim put the basis of her complaint in writing, that document should be attached to the report as an exhibit.

Next, after discussing any initial preparation for the investigation, such as review of personnel files, the investigators should describe their interviews of the victim, perpetrator, and corroboration witnesses. For each interview, the investigators should note who was present and where and when the interview was held. The questions asked and the answers given, *with as little paraphrasing as possible*, should be provided. The investigators should also comment on each person's credibility. The person's demeanor, emotional state, and level of voice all should be described.

For corroboration witnesses, the investigators should note why that person was interviewed (for example, the witness was identified by the victim as someone who may have seen what happened) and the corroboration he or she provided. The investigators should also note whether the witness had firsthand knowledge or learned of the sexual harassment complaint only through the rumor mill. In making the disciplinary decision, the investigators should not rely upon the statements of a witness who knows about the sexual harassment only through someone other than the victim or perpetrator.[16] The investigators should note in the report their reasons for not interviewing anyone identified by the victim, perpetrator, or other witness.

The investigators should then state their conclusion as to whether they believe sexual harassment occurred and why. Again, the report should contain specific justification for the conclusion.[17]

If the investigators conclude that sexual harassment occurred, three general principles should guide the investigators in deciding what corrective action to take. First, *the discipline should be reasonably calculated to prevent future harassment*. There is a wide range of discipline that the investigators can recommend, from oral warning to discharge. The more severe and pervasive the perpetrator's conduct, the harsher the penalty will likely have to be to deter similar conduct and to avoid liability in a subsequent sexual harassment lawsuit.[18] The victim's input should be sought to determine the most effective remedy to ensure a harassment-free work environment, although the investigators should be careful not to promise the victim that they *will* follow her suggestions. The perpetrator's supervisor also might have valuable input as to whether a particular remedy will effectively deter the perpetrator from committing future acts of harassment.

Second, *the corrective action should not punish the victim.* The investigators may conclude that the victim and perpetrator should be separated to prevent further harassment or retaliation. Even if the investigators conclude that the victim's sexual harassment allegations cannot be substantiated, the investigators should consider separating the victim and perpetrator due to hard feelings engendered during the investigation. If the investigators decide to separate the two, the *perpetrator* should be transferred or demoted, not the victim. If the victim is transferred, she may later claim either that the transfer constituted retaliation for complaining about sexual harassment or that her transfer was not a proper remedial measure.[19]

Third, *the discipline selected should be consistent with the discipline imposed in the past in similar situations.* The investigators should review previous cases of sexual harassment at the company and determine if the facts of a prior case are similar to the one that they are currently investigating. The recommended discipline should be consistent with the disciplinary action taken in previous, similar cases. Otherwise, the company could face a charge of discrimination from the perpetrator who was treated less favorably.[20]

After the report is drafted, it should be submitted to the decision-making official to review. This level of review should not be a rubber stamp. The official should not merely rely on the "professionalism" of his or her investigators.[21] Instead, he or she should offer his or her criticisms of the report, point out deficiencies that he or she sees in the report or statements, suggest or order that follow-up questions be asked or that other persons be interviewed, and even conduct some interviews him or herself if there are doubts about the credibility of any of the people interviewed. All of this should, of course, be documented. The investigators should revise or supplement their report after taking action suggested by the decision-making official.

Follow Up with the Perpetrator and the Victim

After a decision has been made as to the appropriate corrective action to take, the perpetrator should be informed of the decision. The decision should be documented and a copy of the disciplinary action taken placed in the perpetrator's personnel file. The meeting in which the discipline is explained should be documented as well.

The victim also should be notified of the corrective action that has been taken. Hopefully, the remedial measures will meet with her approval. How the victim reacts to the information should be documented, that is, whether she expressed satisfaction or dissatisfaction with the measures.

CONCLUSION

No matter how thorough and complete an investigation, and no matter how effective a remedy, a victim of sexual harassment may still seek redress in court. Similarly, no matter how careful and fair an investigation, and no matter how just the disciplinary action, a perpetrator may feel wronged and also seek a remedy in court. When this happens, the investigators' actions during the investigation will come under sharp scrutiny. The companies that follow this article's guidelines for conducting the internal sexual harassment investigation—use two investigators; promptly begin investigating; interview not only the victim and perpetrator but also other witnesses; examine the evidence from a reasonable woman's perspective; draft a thoughtful, balanced report; and impose discipline that will be effective in preventing further harassment and that is consistent with discipline previously imposed—will be in a good position to withstand such scrutiny and prevail in a lawsuit brought either by the victim or perpetrator of sexual harassment.

NOTES

1. This article refers to the person who was allegedly harassed as the "victim" and the person who allegedly harassed the victim as the "perpetrator." For brevity's sake, the article omits the word "alleged" when referring to the victim and perpetrator. The article also refers to the victim as female and the perpetrator as male, since sexual harassment is most often perpetrated by males on females, although sexual harassment can be perpetrated by females on males or can occur between two people of the same sex.

2. *Brooms v. Regal Tube Co.*, 881 F.2d 412, 421 (7th Cir. 1989); accord *Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir. 1991) ("We next must determine what remedial actions by the employer shield them from liability under Title VII for sexual harassment by co-workers."); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417 (10th Cir. 1987) (Supreme Court in *Vinson* "repudiated the view that . . . 'employers are always automatically liable for sexual harassment by their supervisors.'"); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990) ("if a plaintiff proves that management-level employees had actual or constructive knowledge about the existence of a sexually hostile environment and failed to take prompt and adequate remedial action, the employer will be liable.").

3. The Civil Rights Act of 1991 placed a cap on the amount of compensatory and punitive damages a sexual harassment plaintiff may recover depending on the size of the company. The caps range from $50,000 for employers with 15 to 100 employees to a cap of $300,000 for employers with over 500 employees.

4. See, e.g., *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 621 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987) (holding that the "promptness and adequacy of the employer's response to correct instances of alleged sexual harassment . . . must be evaluated upon

a case by case basis"); *Bennett v. New York City Dept. of Corrections*, 705 F.Supp. 979 (S.D.N.Y. 1989) (employer's failure to respond to sexual harassment complaint for four weeks was evidence that employer "did not take reasonable measures to enforce anti-harassment policies with enough speed"); *Dornbecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 309 (5th Cir. 1987) (company's handling of the sexual harassment complaint was prompt and decisive, where company responded to complaint within twelve hours).

5. This article assumes that the investigators' company has a sexual harassment policy which designates more than one responsible, knowledgeable, and credible official to whom victims of sexual harassment may bring their complaints. Further, the article assumes that the investigators' responsibility, as designated in the policy, is to investigate the complaint and make a recommendation to the vice president of human resources or other top executive who has the ultimate authority to decide the corrective action to take. Thus, in instances of disagreement between investigators, the vice president of human resources can act as the tie-breaking vote. For an in-depth discussion of what should be included in a sexual harassment policy, see Connell, "Effective Sexual Harassment Policies: Unexpected Lessons from *Jacksonville Shipyards*," 17 *Empl. Rel. L.J.* 191 (1991).

6. The court stated that, "A reading of plaintiff's memorandum in opposition [to defendant's motion for summary judgment] would convince one that he was a very competent manager who has been victimized by two independent and vicious plots from both his employer [the investigator] and his employee restaurant personnel [who made the charges]." *Simpson v. Pizza Hut*, 58 Fair Empl. Prac. Cas. (BNA) 558, 560 (E.D. Pa. 1991).

7. This is an even greater concern for public employers, who are bound by the United States Constitution's due process provisions. A failure to conduct a fair and impartial investigation of a sexual harassment claim could lead to a finding that the public employer violated the perpetrator's due process rights. See, e.g., *Adams v. Sewell*, 946 F.2d 757 (11th Cir. 1991) (affirming a jury's finding that a county employee was denied due process of law during the county's investigation of sexual harassment complaint against him and affirming an award of over $300,000 to the plaintiff).

8. The victim may hesitate to disclose information for fear of retaliation. If the investigators sense or know that this is the case, they should inform the victim that she and any other witnesses are protected from reprisal and that no retaliation against her or other witnesses will be tolerated.

9. A failure to identify the victim and the specific nature of her complaint to the perpetrator could lead to charges by the perpetrator that the investigation of sexual harassment complaints against him was unfair and biased. See, e.g., *Marsh v. Digital Equip. Corp.*, 675 F.Supp. 1186 (D.Ariz. 1987) (finding that the company's investigation of sexual harassment complaints against a black male supervisor was racially biased because white males accused of sexual harassment were informed of the identity of the victims and the factual basis for the victims' complaint whereas the black supervisor was not).

10. As noted above, public employers are bound by the Constitution's due process guarantees. The denial of a public-employee perpetrator's request to have his attorney present during his interview may violate the perpetrator's due process rights. In addition, if the perpetrator is a union member, he has a legal right to have union representation during his interview. Accordingly, a request for union representation

by a union-member perpetrator should be granted.

11. If the witness identifies two different people, the investigators obviously have another investigation to conduct.

12. *Ellison* (cited in note 2) at 872, 879.

13. Id.

14. These jurisdictions are: the Ninth Circuit Court of Appeals (which encompasses the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington and the territories of Guam and Northern Mariana Islands), the Third Circuit Court of Appeals (which encompasses the states of Delaware, New Jersey, and Pennsylvania), the Sixth Circuit Court of Appeals (which encompasses the states of Kentucky, Michigan, Ohio, and Tennessee), and at least two federal district courts, one in Maine and one in Jacksonville, Florida; see *Ellison* (cited in note 2), and *Andrews* (cited in note 2) (holding that, to bring a successful sexual harassment claim, a plaintiff must prove that "the discrimination would detrimentally affect a reasonable person of the same sex in that position"); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1988) (holding that in a sexual harassment case involving a male supervisor's harassment of a female subordinate, "it seems only reasonable that the person standing in the shoes of the employee should be 'the reasonable woman'"); *Harris v. International Paper Co.*, 765 F.Supp. 1509, 1515 (D.Me. 1991) (holding in racial harassment case that the "question of whether conduct and speech rises to the level of harassment, putting aside the question of the employer's knowledge, must be considered only from the employee/victim's perspective"); *Robinson v. Jacksonville Shipyards Inc.*, 760 F.Supp. 1486, 1524 (M.D. Fla. 1991) (holding that "[a] reasonable woman would find that the working environment at JSI was abusive").

15. But cf. *Walker v. Sullair Corp.*, 736 F.Supp. 94 (W.D.N.C. 1990), affirmed in part, reversed in part, 946 F.2d 888 (4th Cir. 1991) (holding that sexual harassment plaintiff failed to prove that sexual conduct was unwelcome where she initiated discussion of her sex life and sexual fantasies and participated in suggestive telephone conversations).

16. In *Kestenbaum v. Pennzoil Co.*, 766 P.2d 288, 4 Indiv. Empl. Rts. Cas. 67, 73 (N.M. 1988), the court faulted the company's investigation of sexual harassment allegations against the plaintiff because the investigator "failed to differentiate between first-hand knowledge, attributed hearsay or mere gossip or rumor . . . ."

17. For example, if the investigators conclude that sexual harassment did not occur, they should have firm, verifiable grounds for that conclusion. See *Ryan v. Tau Laboratories*, 52 Empl. Prac. Dec. (CCH) ¶39595 (S.D.N.Y. 1989) (court found against sexual harassment plaintiffs because the alleged perpetrator's denials were credible and corroborated; the plaintiffs disliked their supervisor; they originally had complained only about his ineptitude, not sexual harassment; and there were numerous inconsistencies in the victims' stories). If the investigators disagree whether sexual harassment occurred, both should state the specific reasons for their conclusions in the report, and the report should then be submitted to the decision-making official for a tie-breaking vote.

18. The courts have been result-oriented in their review of employers' remedies to sexual harassment. If the remedy prevented further harassment, companies have avoided liability. See, e.g., *Tunis v. Corning Glass Works*, 57 Fair Empl. Prac. Cas. (BNA) 1125, 1130 (S.D.N.Y. 1990), aff'd, 57 Fair Empl. Prac. Dec. (BNA) 1224 (2d Cir. 1991)

(company not liable when, immediately after victim complained about photographs of naked women posted in public places, company took pictures down and victim "was no longer confronted with pinup photography in any public area or space throughout the plant"); *Steele v. Offshore Shipbuilding*, 867 F.2d 1311, 1317 (11th Cir. 1989) (employer not liable where harassment stopped after prompt reprimand was given). If the remedy failed to prevent further harassment, companies have been held liable. See, e.g., *Brooms* (cited in note 2) (company held liable under Title VII because its "arguably limited response" failed to prevent the perpetrator from renewing his sexual and racial comments).

19. See *Ellison* (cited in note 2) at 882 ("[w]e strongly believe that the victim of sexual harassment should not be punished for the conduct of the harasser. We wholeheartedly agree with the EEOC that a victim of sexual harassment should not have to work in a less desirable location as a result of an employer's remedy for sexual harassment."); *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990) ("a remedial measure that makes the victim of sexual harassment worse off is ineffective per se. A transfer that reduces the victim's wage or other remuneration, increases the disamenities of work, or impairs her prospects for promotion makes the victim worse off. Therefore such a transfer is an inadequate discharge of the employer's duty of correction.").

20. Compare *Marsh* (cited in note 9) (finding that company discriminated against black supervisor, who was fired after complaints of sexual harassment were made against him, where white employees, whose conduct "was considerably more explicitly suggestive than any of the [black supervisor's] conduct," were not fired after complaints of sexual harassment were made against them) with *EEOC v. Mount Vernon Mills*, 58 Fair Empl. Prac. Cas. (BNA) 73 (N.D. Ga. 1992) (finding that black employee was not discriminated against because all employees who were guilty of substantiated claims of sexual harassment were treated the same).

21. See *Kestenbaum* (cited in note 16) (vice-president's failure to look at the way the investigation of sexual harassment had been handled, and his mere reliance upon the professionalism of his investigators, supported the jury's finding that the company did not have reasonable grounds to fire the plaintiff who had been accused of sexual harassment).

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EFFECTIVELY MANAGING PERFORMANCE PROBLEMS OF EMPLOYEES WHO FILE *QUI TAM*, SEXUAL HARASSMENT, SAFETY, DISCRIMINATION OR DISABILITY CLAIMS

I. STEPS FOR REDUCING THE RISK OF PUBLIC POLICY WRONGFUL DISCHARGE OF WHISTLEBLOWER CLAIMS WHILE PROACTIVELY ADDRESSING PERFORMANCE PROBLEMS

A. Train supervisors not to ignore complaints, comments or questions from employees about safety matters, ethical issues, discrimination, product pricing or other legally sensitive issues. Supervisors should be instructed to promptly refer such matters to the appropriate internal resource or department for inquiry and response.

B. Promptly investigate the issue raised and inform the employee of the results of any inquiry and corrective action taken, if any.

C. Document that the issue was raised, all steps taken to respond to it, including that the results of the inquiry were communicated to the employee.

D. Whether the employee is undergoing performance counseling at the time the safety or other business practices issue was raised, or subsequently encounters performance problems, be sure to:

1. Follow all written policies and procedures governing disciplinary counseling and actions;
2. Document the performance or conduct problem;
3. Retain any "hard" evidence of the problem, i.e., sloppy work product, attendance records; and
4. Keep conversations and documents about the performance problems separate from discussions about the safety, ethics or other issue raised.

E. Ensure that all individuals involved with investigating allegations of company wrongdoing understand the obligation not to retaliate against the complaining employee.

THE GOAL IS TO MAKE IT DIFFICULT FOR THE EMPLOYEE TO CLAIM OR SHOW THE RESPONSE TO HIS/HER PERFORMANCE PROBLEM WAS RELATED TO THE ALLEGATION OF COMPANY WRONGDOING.

II. AVOIDING RETALIATION CLAIMS

A. Educate the supervisor or other employee who has been named in a complaint or whose actions are being challenged about his/her obligation not to take adverse action. While individuals can readily grasp that negative conduct, such as threats, will be viewed as retaliatory, other seemingly innocent conduct may likewise be challenged. For example:

1. Avoiding contact with the complaining employee;

2. Ceasing friendly interchanges, such as "good morning";

3. Taking the employee "out of the loop" of internal communications; and

4. Changing minor work responsibilities so as to minimize contact.

These actions are often taken as a means of "not making things worse," but can have the opposite effect. The key is to maintain a **"business as usual"** atmosphere.

B. Set up a review procedure for all promotional decisions, pay raises, bonus determinations, performance counseling, performance reviews and other decisions affecting the complaining employee's status or terms, conditions and benefits of employment. Before any actions are taken, make sure the business basis for the decisions, counselings or disciplinary actions can be strongly articulated and are supported by documentation.

C. Designate a neutral person, i.e., someone not factually involved in the controversy, to review all decisions regarding the complaining employee prior to action being taken.

D. If the potential for adverse reaction by the complaining employee's work group exists, caution co-workers that ostracism, negative comments or taunting will be grounds for disciplinary action. Co-workers should at the very least remain neutral.

E. Periodically check in with the complaining employee, allowing an opportunity for issues to be raised. If none are raised, these periodic discussions will be helpful in defending issues asserted after the fact.

F. If the complaining employee's conduct in violating company policies or poor performance merits disciplinary action:

1. Follow all applicable company policies and procedures;

2. Document the conduct or performance issues thoroughly, avoiding generalities such as "bad attitude";

3. Involve a "neutral" party in the decision-making process; and

4. Retain copies of substandard work product or other documents which substantiate the problems.

III. MANAGING EMPLOYEE CLAIMS THAT PROTECTED PHYSICAL OR MENTAL DISABILITIES ARE THE CAUSE OF PERFORMANCE PROBLEMS

A. After the employee self identifies, request an evaluation by a health care provider or physician, including a description of the medical problem and any job limitations. Provide the evaluator with a job description or duties list which clearly labels essential and marginal duties, and a description of the performance difficulties.

1. If the medical certification describes job impairment and work limitations, evaluate whether the limitations can be reasonably accommodated.

2. If the medical certification does not contain work limitations, continue to hold the employee to his/her performance goals and expectations.

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B. The Duty To Reasonably Accommodate May Include:

1. Making existing facilities used by employees readily accessible to and usable by individuals with disabilities;
2. Job restructuring;
3. Part-time or modified work schedules;
4. Reassignment to a vacant position;
5. Acquisition or modification of equipment or devices;
6. Appropriate adjustment or modifications of examinations;
7. The provision of qualified readers or interpreters;
8. Other similar accommodations for individuals with disabilities; and
9. Flexible application of policies and procedures.

QUI TAM "WHISTLEBLOWER" ACTIONS: A CASE STUDY

The *qui tam* provisions of the federal civil False Claims Act, 31 U.S.C. §§ 3729-3731 (1988 & Supp. III 1991), enable private individuals to file suit in the name of the federal government charging defendants with defrauding the government. With the whistleblower sharing from fifteen to thirty percent of the government's recovery, there is a strong incentive for employees who believe they have become aware of wrongful conduct within a company to file under the Act.

The underlying allegations charged in whistleblower suits under the False Claims Act generally are similar to allegations charged by the United States in criminal and civil fraud actions against government contractors. They include cost mischarging, fraudulent testing, quality control failures, and the submission of false pricing information. In recent years, there have been several *qui tam* suits brought against health care providers for overbilling and against universities and other government grant recipients for misuse of funds.

There are steps that companies can take to disourage employees from filing false claims lawsuits. First, companies should create a corporate culture emphasizing the goal of strict compliance with government regulations. This will result not only in fewer instances of non-compliance, but also will give potential whistleblowers a sense that their concerns will be taken seriously. Companies should establish a formal policy requiring employees to disclose immediately potentiall or actual problems to designated individuals in management. Many companies employ a "hotline" so that concerns can be raised anonymously.

Companies should undertake a thorough investigation of any complaints. The investigation should include interviews with other employees who may be knowledgeable regarding the subject matter and collection of whatever information the complaining employee has to offer. The whistleblower should be kept apprised regularly regarding the status of the investigation. Corrective actions should be assigned to a level of management that has the authority to act decisively, and the results should be communicated to the complaining employee.

Even when the employee's information turns out to be wrong, the company owes that individual an opportunity to be heard and to receive a responsive reply from management. The time and effort spent in giving an employee a hearing, whether through a formalized procedure or through an open-door policy, is well spent in terms of eliminating any wrongful conduct, building employee morale, and reducing the likelihood of a lawsuit. Since liability under the False Claims Act requires proof that the company acted with at least reckless disregard, a constructive response by the company to the employee's allegations and complaints may well influence the outcome of the suit, even if the litigation itself cannot be avoided.

Once an employer becomes aware that an employee actually has filed suit under the False Claims Act, it must be extremely careful in its dealings with the whistleblower. The Act contains a provision protecting whistleblowers from being "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against . . . because of lawful acts done by the employee on behalf of the employee or others in furtherance of [a *qui tam* action] . . . including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed." 31 U.S.C. § 3730(h) (1988). This provision was enacted to prevent employers from using the threat of economic retaliation to silence potential whistleblowers, as well as to assure those who may be considering exposing fraud that they are legally protected from retaliation. Whistleblowers who prove such discrimination are entitled to reinstatement, double the amount of back pay with interest, as well as any special damages including litigation costs and attorneys' fees.

In order to prove such discrimination, the employee must show, by a preponderance of the evidence, that the employer was aware of the employee's pursuit of a false claims lawsuit and that the discrimination was motivated, at least in part, because of the employee's whistleblowing action. Once these elements are proven, the burden then shifts to the employer to prove that the same decision regarding the employee's job status would have been made even if the employee had not been a whistleblower.

In the course of its investigation into the lawsuit, the company should review the whistleblower's personnel file and conduct discreet interviews with the whistleblower's supervisors. Much can be learned about the basis for the employee's suit, including whether the employee has some improper motive for bringing suit, and the extent of the employee's knowledge concerning the subject matter of the suit.

Once the lawsuit has been filed, it is no longer advisable for management to communicate directly with the plaintiff concerning the subject matter of the lawsuit. Such communication, whether by management or company counsel, should be directed to the plaintiff's attorney.

The plaintiff, if he or she is a current employee, should be allowed to carry out his or her regular job duties without interference or harassment by management or co-workers. Any diminution in those duties imposed by the company, no matter how slight, may be deemed to be discriminatory in nature. In many cases, the plaintiff's co-workers might learn of the plaintiff's lawsuit as a result of the government's or the company's investigation into the allegations or from accounts in the news media. Co-workers who are loyal to the company or who believe their jobs could be threatened by the lawsuit may feel some degree of animosity toward the plaintiff. In such cases, management must instruct the plaintiff's co-workers that any harassment or discrimination against the plaintiff will not be tolerated.

The filing of a false claims action does not give the employee-plaintiff a license to violate company policies. The company has a legitimate interest in enforcing rules concerning job performance of all employees including whistleblowers. While there has not yet developed a body of law under the False Claims Act retaliatory discharge provision, courts are expected to follow the criteria established under Title VII cases. Thus, any action taken against a whistleblower should be justified by objective criteria supported by documentation and credible evidence. Company actions based on subjective criteria, such as "lack of teamwork" or "bad attitude," will be difficult to support.

In a number of instances, whistleblowers have attempted to remove from company premises documents and other records belonging to the company. The removal of proprietary documents may be in violation of state labor laws imposing a duty on employees to follow company policies (e.g., Cal. Labor Code § 2856 (West 1989)), and thereby justify appropriate disciplinary action. A plaintiff might argue, however, that the public policy encouraging whistleblowing and the requirement that plaintiffs disclose to the government "substantially all material evidence and information the person possesses," 31 U.S.C. § 3730(b)(2), outweighs the company's concern for maintaining the confidentiality of its records.

Employers can take reasonable steps, without discriminating against the whistleblower, to ensure that its property is not removed. Companies should inform their employees about the policy concerning removal and disclosure of company documents. As part of the company's internal investigation of a whistleblower's allegations, it should gather and secure all documents and records relating to the matter. Those records should then be carefully maintained to prevent from disappearing. When employees are discharged, particularly those who are disgruntled or who have previously raised allegations of wrongdoing, management should conduct an exit interview in which the employee is asked whether he or she is aware of any wrongful conduct. Failure to report the allegations to the company may hurt the plaintiff's credibility later in court. During the exit interview, management should remind the employee of the policy prohibiting the removal of company property, and in some cases it may be necessary for management to examine the employee's personal property to ensure there are no documents labeled "company private" or "company proprietary." Finally, a recent decision from a district court in Illinois held that an employee can bring an action under the whistleblower protection provision even if the employee never filed a *qui tam* action. The court's decision, unless overturned on appeal, could result in employees filing discrimination claims under the False Claims Act and thereby benefiting from the Act's broad protection

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and favorable remedies without ever disclosing the alleged fraud to the government and without incurring the burden of filing a *qui tam* action. In sum, companies that are subject to *qui tam* actions must act with extreme caution in dealing with the job status of any whistleblower, even one who has not yet filed a *qui tam* action.

THE NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS

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DEALING WITH EMPLOYEE MISCONDUCT (ON AND OFF DUTY): A PRACTICAL FRAMEWORK

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> He's not the finest character that ever lived. But he's a human being, and a terrible thing is happening to him. So attention must be paid. He's not to be allowed to fall into his grave like an old dog. Attention, attention must be finally paid to such a person.
>
> Arthur Miller, Death of a Salesman, 1949

I. INTRODUCTION

The measure of a good place to work is rarely gauged by how an employer treats its stellar employees. More often, the quality of a workplace is better judged by the manner in which employees are treated when problems surface. Most certainly, triers of fact charged with reviewing discipline or termination for misconduct -- be they judges, juries, arbitrators, hearing referees, or even faculty committees -- will pay as much attention to the way employees were treated and the fairness of process, as they will to the merits of the misconduct.

The purpose of this paper is to provide a practical framework for dealing with on and off duty misconduct in a manner which will maximize chances that whatever discipline or termination is issued will be sustained if challenged in an external forum, or even more rarely these days (but not unprecedented), will not even be appealed.

First, two generally applicable concepts of fundamental fairness in dealing with misconduct -- due process and just cause will be defined and reviewed. Second, the general legal rights an employee may have to representation upon request will be discussed. Third, several specific recurring areas of misconduct, and some practical suggestions for dealing with them will be briefly treated, including criminal and sexual misconduct (on and off duty), and misconduct involving drugs, alcohol, scientific research, and violence. Finally, returning to more general advice, the topics of searches for evidence of misconduct, and making the decision regarding misconduct will be covered.

My co-presenter, Stephen J. Hirschfeld, has ably treated in his written materials the subject of how an investigation should be conducted, and will also speak to that subject in his oral presentation.

II. WHAT PROCESS IS DUE?

Generally, if a public employee has a "property right" in continued employment, such as tenure or other protection from dismissal except for cause, then constitutional due process rights attach. Board of Regents v. Roth, 408 U.S. 564 (1972). If an employee does not have a property interest in continued employment, such as with regard to non-renewal of a term contract, then constitutional due process rights do not apply to the non-renewal, unless in the course of non-renewal, an employee's "liberty" rights are implicated, such as when an employer would publicly impugn an employee's reputation in the non-renewal process. Roth, supra; and Perry v. Sinderman, 408 U.S. 593 (1972). See also Wieman v. Updegraff, 344 U.S. 183 (1952) [college professors and staff members dismissed during the terms of their contracts have interests in continued employment safeguarded by due process]; Slochower v. Board of Education, 350 U.S. 551 (1956) [a public college professor dismissed from an office held under tenure provisions had a property interest in continued employment to which due process attached].

Employees who do not have protected property rights in continued employment, such as employees who serve "at the pleasure of" or "at the will of" the controlling Board or President, do not have constitutional due process rights. However, many public and private institutions adopt by policy, practice, or contract due process protections regarding discipline or dismissal for misconduct, and these, of course, must be followed.

A. MINIMUM STANDARDS OF DUE PROCESS PRIOR TO SUBSTANTIAL DISCIPLINE OR DISMISSAL FOR MISCONDUCT

The Supreme Court, in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), set forth the minimum due process standard which would apply to pre-termination hearings regarding dismissal for misconduct, and by square analogy, to pre-suspension hearings for misconduct. This standard includes (1) notice of the charges regarding the misconduct; (2) an explanation of the evidence supporting the charges; and (3) an opportunity for the employee to tell her or his side of the story.

B. BEYOND THE MINIMUMS: LOOK TO THE LAW OF YOUR JURISDICTION

When due process rights attach, what process is due prior to effecting discipline or dismissal for misconduct is dependent upon the specifics of any applicable practices, policies, or contracts at your institution, supplemented by the law of your jurisdiction. There are literally thousands of decisions applying due process standards to specific instances of discharge or discipline for misconduct. If one looks hard enough in a national Lexis or Westlaw search, one can find cases on both sides of almost every more specific question of what process need be afforded. Some generally instructive or useful cases are summarized below.

1. General Elements of Due Process

Due process standards include the right (1) to be advised of the cause for termination; (2) to be advised of the names and the nature of the testimony of witnesses; (3) to have a meaningful opportunity to be heard within a reasonable time; and (4) to have a hearing before a tribunal that possesses some academic expertise and apparent impartiality toward the charges. Levitt v. University of Texas, 759 F.2d 1224 (5th Cir. 1985). Other cases stating essentially the same principles include: Kowtoniuk v. Quarles, 528 F.2d 1161 (4th Cir. 1975); Chung v. Park, 514 F.2d 382 (3rd Cir. 1975); Anapol v. University of Delaware, 412 F.Supp. 675 (D. Del. 1976); King v. University of Minnesota, 774 F.2d 224 (8th Cir. 1985).

2. Specificity and Notice

Frequently, cases involve challenges to definitions of cause for dismissal or to behavioral standards on due process grounds of vagueness or overbreadth, or lack of specificity or notice regarding the charges.

a. Rules which provide that the personal conduct of the employee "shall be of such a nature as not to bring discredit upon the institution," and which prohibited unauthorized occupation of university facilities and interference with its normal and regular activities, when coupled with the rule that "the cause for removal shall be only such as seriously interferes" with a teacher's "usefulness to the university," were not unconstitutionally vague or overbroad. Dougherty v. Walker, 349 F.Supp. 629 (W.D. Mo. 1972).

b. On its face, the requirement of the university code that a professor exercise appropriate restraint and show respect for the opinions of others was susceptible of interpretations which would render it overbroad and would thus deter vigorous advocacy of unpopular ideas. The Court of Appeals would take notice that such requirement was adopted almost verbatim from a statement of a professors' association and that such association had viewed the requirement as not referring to the substance of a teacher's remarks, and would remand civil rights case to the district court to hear testimony from the Board of Regents in order to determine whether the Regents' construction of such requirement was the same as that of the professors' association. Adamian v. Jacobson, 523 F.2d 929 (9th Cir. 1975).

c. Where a teacher had been found guilty of making sexual advances to some of his pupils, he would not be heard to complain that a statute permitting discharge for "immorality and other good and just cause" was so impermissibly vague that he would not be expected to know that his actions would fall within its meaning. Kilpatrick v. Wright, 437 F.Supp. 397 (M.D. Ala. 1977).

d. The terms "insubordination," "misconduct," and "violation of rules and regulations" used in the faculty code as grounds for termination were not unconstitutionally vague or overbroad. Stastny v. Board of Trustees, 647 P.2d 496 (Wash. App. 1982).

e. Statements of professional ethics adopted by the university were sufficient notice of the standard of conduct to a tenured professor terminated as a result of sexual advances made toward and gifts given to male students. Korf v. Ball State University, 726 F.2d 1222 (7th Cir. 1984).

f. A rule that permits the dismissal of tenured faculty for "substantial and manifest neglect of duty, or personal conduct substantially impairing the individual's performance of his or her appropriate function with the University community," when coupled with the further "Policy on Campus Disruption," was not unconstitutionally vague. Franklin v. Stanford University, 218 Cal. Rptr. 228 (Cal. App. 6 Dist. 1985).

g. The decision to discharge for failure to perform instructional duties adequately rather than for a violation of a particular rule or act of misconduct was based on ascertainable standards expressed in the faculty handbook. Riggin v. Board of Trustees of Ball State University, 489 N.E.2d 616 (Ind. App. 1 Dist. 1986).

h. A college instructor must be advised of the names and the nature of the testimony of witnesses against him and be granted a hearing at a reasonable time after such notice. Furguson v. Thomas, 430 F.2d 852 (1970). See also Peacock v. Board of Regents, 510 F.2d 1324 (9th Cir. 1975).

i. Since some notice had been given a reasonable time (13 days) ahead of the scheduled hearing for dismissal on charges of willful neglect of duty and incompetence, an objection to the sufficiency of notice not made until commencement for the hearing came too late. Staton v. Mayes, 552 F.2d 908 (10th Cir. 1977).

j. A professor does not necessarily have to have both notice of the charges and an opportunity to remedy his deficiency. Agarwal v. Regents of the University of Minnesota, 788 F.2d 504 (8th Cir. 1986).

3. Open Hearing

Cases can be found on both sides. For example,

a. The constitution does not require that a tenure termination hearing be open to the public. Dougherty v. Walker, 349 F.Supp. 629 (W.D. Mo. 1972).

b. Indiana's "Open Door Law" requires open dismissal hearing conducted by ad hoc committee. Riggin v. Board of Trustees of Ball State University, 489 N.E.2d 616 (Ind. App. 1 Dist. 1986).

4. Right To Be Represented By An Attorney

a. In the absence of a showing of special circumstances requiring the presence of counsel, the absence of counsel would not invalidate the grievance procedure available to non-tenured college professors who were not rehired. And, the court indicated it could well understand then when intelligent, educated professors are weighing issues of tenure and faculty qualifications -- issues crucial to the integrity of an academic institution -- they might prefer to deal with their peers rather than the bar. Toney v. Reagan, 467 F.2d 953 (9th Cir. 1972).

b. A university is not required to pay for the professor's attorney. Cornwall v. University of Florida, 307 So.2d 203 (Fla. 1975).

c. Where university regulations (not governing faculty dismissal) provided for informal post-termination procedures consisting of 5 steps of review involving an employee's immediate supervisor, the officer to whom the supervisor reported, the personnel director, the university appeal board and provost, and such regulations also provided for access to counsel for preparation and advice, and representation by an employee of the university, the regulation preventing a discharged employee from having a representative who was not an employee of the university did not violate the due process rights of a discharged employee. Downing v. LeBritton, 500 F.2d 689 (lst Cir. 1977).

d. Plaintiff was entitled to an opportunity to appear with an attorney. Soni v. Board of Trustees, 376 F.Supp. 289 (E.D. Tenn. 1974); aff'd 513 F.2d 347 (6th Cir. 1975).

5. Recording Or Transcribing The Hearing

The grievance procedure requirement that upon appeal to the chancellor's level, the grievant was required to pay for preparation of a transcript and to provide one to the college, did not invalidate the procedure. Toney v. Reagan, 467 F.2d 953 (9th Cir. 1972).

6. Rules of Evidence, Procedures, Sworn Testimony

a. Fairness may require assurances from the board to faculty witnesses that there will be no reprisals. A fair hearing requires that equal treatment be accorded exhibits of both parties. State v. McPhee, 94 N.W.2d 711 (Wis. 1959).

b. It is not essential in all circumstances to a fair and adequate hearing that it be conducted in a trial-like atmosphere complete with attorneys to challenge offered evidence and legally trained hearing officers to rule on evidentiary questions. Toney v. Reagan, 467 F.2d 953 (9th Cir. 1972).

c. It was not necessary that witnesses in an evidentiary hearing be sworn when the witnesses were not self-interested and the evidence was not in dispute. Broussard v. Regents of University of California, 184 Cal. Rptr. 460 (1982).

7. Right to Confront and Cross-Examine

a. See cases at II.B.1 above.

b. Information obtained by written statement with no oral testimony or opportunity to cross-examine might be objectionable but not where the facts were not in dispute and the evidence was overwhelming. Prebble v. Broderick, 535 F.2d 605 (10th Cir. 1976).

8. Attorney's Participation - Dual Role

a. An attorney acting in dual capacity as attorney for the charging party and for the hearing panel in tenure termination proceedings should be avoided.

b. It is not proper for an attorney to both present the charges and the evidence and sit on the board in judgment. State v. McPhee, 94 N.W.2d 711 (Wis. 1959).

9. Procedural Variation From The Rules

a. When published rules and regulations establish a particular statutory procedure for the termination of a teacher's employment, they may add to the constitutional minimum. If they do, such regulations must be followed. Furguson v. Thomas, 430 F.2d 852 (5th Cir. 1970).

b. Where constitutional due process minimums are met, variation from the procedures in the handbook are not fatal where the professor made a conscious choice of obtaining a hearing which differed from the handbook so as to waive the additional rights. Chung v. Park, 377 F.Supp. 524 (M.D. Pa. 1974).

c. So long as the substantial interests that a college's termination procedures are designed to safeguard are in fact satisfied and protected, the college's failure to conform to every detail of the procedures is not actionable. Piacitelli v. Southern Utah State College, 636 P.2d 1063 (Utah 1981).

d. A person may elect to forego strict legal procedures to which he or she might be entitled, and where this occurs, he or she cannot be permitted to speculate upon a favorable result in the chosen proceedings and then refuse to be bound by an adverse decision. Samaan v. Trustees of California State University, 197 Cal.Rptr. 856 (Cal. App. 3 Dist. 1983).

e. There is not a violation of due process every time a university violates its own rules. Such action may constitute a breach of contract or violation of state law, but unless the conduct trespasses on federal constitutional safeguards, there is no constitutional deprivation. Levitt v. University of Texas, 759 F.2d 1224 (5th Cir. 1985).

10. Miscellaneous

a. A chemistry instructor was not deprived of a fair hearing on charges of unfitness to teach by the request that she perform experiments which she has been responsible for teaching. Bevli v. Brisco, 212 Cal.Rptr. 36 (Cal. App. 2 Dist. 1985).

b. Laches applies to quasi-adjudicative proceedings, and a four-year delay in instituting disciplinary proceedings based on alleged sexual harassment of female students was not justified. Brown v. California State Personnel Board, 213 Cal.Rptr. 53 (Cal. App. 3 Dist. 1985).

c. The absence of the professor during a part of his hearing when his attorney was present and consented to the tribunal's hearing evidence was not a denial of due process. Levitt v. University of Texas, 759 F.2d 1224 (5th Cir. 1985).

d. A faculty member with tenure could not be fired on grounds of lack of a master's degree without a hearing to explore the possibility that the regulation has been bent for others. Dauel v. Board of Trustees of Elgin Community College, 768 F.2d 128 (7th Cir. 1985).

e. Res judicata (double jeopardy?) is not applied to preclude the university from considering past offenses in proceedings for discharge. Agarwal v. Regents of the University of Minnesota, 788 F.2d 504 (8th Cir. 1986).

III. THE PARAMETERS OF JUST CAUSE

Almost all collective bargaining agreements, and many university policies generally require "just cause" for discipline or dismissal for misconduct. The terms "cause," "reasonable cause," "adequate cause," or just cause," are interchangeable and equivalent from a legal standpoint. They have been interpreted in thousands of arbitration cases over several decades in all types of employment settings. The most often quoted, and best articulated enunciation of an operational standard for what just cause means as related to discipline or discharge was authored by Arbitrator Carrol Daugherty, who developed seven tests for examining whether a particular disciplinary decision is supported by just cause. These can be found, with notations under each, at 42 Labor Arbitration Reports 555, 557-559. The seven tests can be paraphrased as follows:

1. Did the employer give the employee forewarning of the possible or probable consequences of the employee's conduct?;

2. Was the employer's written policy or managerial order reasonably related to the operation or mission of the employer's business?;

3. Did the employer, before making the decision to discharge or discipline, make an effort to discover whether the employee in fact violated the policy or order?;

4. Was a fair and objective investigation conducted?;

5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?;

6. Did the employer apply its rules, orders, and penalties evenhandedly and without discrimination to all employees?; and

7. Was the degree of discipline administered by the employer reasonably related to the seriousness of the offense and the record and service of the employee?

It is readily apparent from these tests that "due process" and "just cause" are very much related concepts in their application.

The following represent some examples of cases where just cause was or was not found, mostly in the setting of higher education.

A. CASES DEFINING OR FINDING ADEQUATE CAUSE FOR DISMISSAL OF FACULTY EMPLOYEES

1. Violation of a standard providing for continued employment "during efficiency and good behavior." Wisconsin statute cited in Board of Regents v. Roth, 408 U.S. 564 (1971).

2. Unauthorized occupation of a university facility -- interference with normal and regular activities -- doubt as to future usefulness. Dougherty v. Walker, 349 F.Supp. 629 (W.D. Mo. 1972).

3. Intransigence with respect to dealings with superiors and incompetence. Chung v. Park, 377 F.Supp. 524 (M.D. Pa. 1974).

4. Refusal to follow curriculum and calendar, incompetency, inefficiency, and insubordination. Saunders v. Reorganized School District, 520 S.W.2d 29 (Mo. 1975).

5. Specified instances of "unprofessional conduct" such as failing to serve on departmental committees, failing to work cooperatively with members of the department, and evicting a colleague from a class which the colleague had been assigned to teach. Kowtoniuk v. Quarles, 528 F.2d 1161 (4th Cir. 1975).

6. Failure to take part in mandatory college functions. Shaw v. Board of Trustees, 549 F.2d 929 (4th Cir. 1976).

7. Misrepresentation of or failure to inform regarding true academic credentials. Barsycz v. Board of Trustees, 400 F.Supp. 675 (N.D. Ill. 1975).

8. Neglect of Duty -- failure to teach on eight scheduled days in one semester. Prebble v. Broderick, 535 F.2d 605 (10th Cir. 1976).

9. A professor's action in ignoring a warning and absenting himself from duty after the denial of his request for a brief leave of absence constituted insubordination. Stastny v. Board of Trustees, 647 P.2d 496 (1982).

10. The evidence supported cause for dismissal for "conduct detrimental to the nursing program" and "inability to cooperate with and maintain harmony among the staff." Kelly v. Kansas City Community College, 648 P.2d 225 (1982).

11. Persistently flouting the authority of the department head and refusing to meet scheduled classes was adequate cause for dismissal. Smith v. Kent State University, 696 F.2d 476 (6th Cir. 1983).

12. Conviction of grand theft relative to submitting false claims for Medi-Cal reimbursement (unrelated to work for the university) was sufficient cause for dismissal. Samaan v. Trustees of California State University, 197 Cal.Rptr. 856 (Cal. App. 3 Dist. 1983).

13. Sexual misconduct. Korf v. Ball State University, 726 F.2d 1222 (7th Cir. 1984) [improper advances and gifts to male students]; Levitt v. Moore, 590 F.Supp. 902 (W.D. Tex. 1984) [improper sexual advances toward female students in classes]; Corstvet v. Boger, 757 F.2d 223 (10th Cir. 1985) [solicitation of sexual activity in a student union restroom].

14. The decision to terminate was not arbitrary or capricious or a breach of the employment contract where there was evidence that the professor was not prepared, used irrelevant material, had not updated his material, spent class time on irrelevant matters, was uncooperative, failed to adequately participate in departmental affairs, had not engaged in research or scholarly activities, and his

students could not meet qualifications for advanced work. Riggin v. Board of Trustees of Ball State University, 489 N.E.2d 616 (Ind. App. 1 Dist. 1986).

15. The evidence was sufficient to support a discharge for "significant neglect of duty" based on the failure or refusal to carry out the assigned task of developing two graduate courses. Josberger v. University of Tennessee, 706 S.W.3d 300 (Tenn. App. 1985).

16. Incompetence and plagiarism constituted adequate cause for dismissal. Agarwal v. Regents of University of Minnesota, 788 F.2d 504 (8th Cir. 1986).

B. CASES FINDING OR DEFINING WHEN ADEQUATE CAUSE FOR DISMISSAL OF FACULTY EMPLOYEES DID NOT EXIST

1. "Just cause" means incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, or other conduct which interferes substantially with the continued performance of duties. However, evidence that a particular duty was not completely performed by a teacher on a certain occasion, or evidence of an occasional neglect of some duty of performance, does not, in itself, ordinarily establish incompetency or neglect of duty sufficient to constitute just cause for termination of a tenured teacher. Incompetency or neglect of duty are not measured in a vacuum nor against a standard of perfection, but instead must be measured against the standard required of others performing the same or similar duties. Sanders v. Board of Education, 263 N.W. 2d 241 (Neb. 1978).

2. A Wisconsin statute provided for tenure "during efficiency and good behavior." Urging students not to take northern Wisconsin teaching jobs and voicing opposition to a graduate program because graduate students were permitted to take courses offered as part of a bachelor's program did not qualify as inefficiency or bad behavior. State v. McPhee, 94 N.W.2d 711 (Wis. 1959).

3. A single sexual advance to a student made without a threat of retaliation did not support the disciplinary charge of unprofessional conduct based on a "series and pattern" of sexual harassment. Brown v. California State Personnel Board, 213 Cal.Rptr. 53 (Cal. App. 3 Dist. 1985).

4. The failure of a tenured professor at a private university to teach a class until an incident with a disruptive student was resolved did not per se constitute "neglect of professional responsibilities' as referred to in the faculty handbook. "Neglect" implies an assessment as to whether the professor's actions were within the range of acceptable conduct. McConnell v. Howard University, 818 F.2d 58 (D.C. Cir. 1987).

C. JUST CAUSE FOR DISCIPLINE OR DISMISSAL FOR MISCONDUCT BY NON-FACULTY EMPLOYEES

One very good source for illustration of various bases which support just cause for discipline or dismissal of employees in general is found in How Arbitration Works by Professors Elkouri and Elkouri, which is the best single treatise summarizing the arbitral framework. Chapter 15 of the book (3rd Edition 1973) is devoted to "Discharge and Discipline," followed at pps. 652-666 by a table of citations to cases where discipline or discharge was or was not sustained. Reasons summarized in this table include absenteeism, tardiness, loafing, absence from work, leaving post (including early quitting), sleeping on the job, assault and fighting among employees, horseplay, insubordination, threat or assault of management representative, abusive language to supervision, profane or abusive language (not toward supervision), falsifying company records (including time and production records), falsifying employment application, theft, disloyalty to government (security risk), disloyalty to employer, moonlighting, negligence, damage to or loss of machine or materials, incompetence (including low productivity), slowdown, possession or use of drugs, possession or use of intoxicants, obscene or immoral conduct, and gambling. This list would make a good outline for a set of work rules for many classifications of staff employees.

IV. RIGHTS TO REPRESENTATION DURING INTERVIEWS WHICH MAY LEAD TO DISCIPLINE OR DISCHARGE FOR MISCONDUCT

Cases can be found on both sides of the question whether an employer is required to allow an employee representation by an attorney in proceedings regarding discipline or dismissal for misconduct. Some of those cases are summarized above in the due process section, at II.B.4 above. Many institutions have policies against use of counsel during internal proceedings, and those policies have generally be upheld.

However, the United States Supreme Court has made clear that employees covered by the provisions of the National Labor Relations Act who are subjected to disciplinary interviews have certain representational rights. In NLRB v. Weingarten, 420 U.S. 251 (1975) and the companion case of Garment Workers v. Quality Manufacturing Co., 420 U.S. 276 (1975), the Court held that employees' rights to engage in "concerted activities for mutual aid and protection" encompass an employee's refusal to submit, without union representation, to an interview which he or she reasonably fears will result in discipline. Therefore, an employer who continues an interview, after denying an employee's request for representation, or who disciplines an employee for refusing to participate in such an interview, commits an unfair labor practice. There are hundreds of NLRB decisions interpreting the extent of this ruling. The employer need not proceed with the interview in the face of such a request, but where it does, it must allow the requested representation. The representative has no right to control the interview, or to cross-examine the employer, but does have the right to counsel the employee being interviewed. Many states have adopted public employment relations statutes which parallel the National Labor Relations Act, and state employment relations commissions which have considered the question have adopted parallel representational protections akin to those afforded by Weingarten.

V. GENERAL CRIMINAL MISCONDUCT: ON AND OFF DUTY

Frequent concerns regarding criminal misconduct by employees include the nexus to the employment relationship, the nature of the investigation which should be conducted and its relationship to external agencies, the impact of a request by an employee for deferral of a parallel employer investigation, and what impact an indictment or arrest should have on employment status, each of which will be treated in turn.

A. THE NEXUS TO THE EMPLOYMENT RELATIONSHIP

Obviously, if criminal misconduct is directly related to one's job, or occurs on duty, or on campus, then there is a direct nexus to the employment relationship, and proceedings for discipline or discharge for the misconduct are mandated. Examples include embezzlement or theft of university funds or property, on duty assaults, on duty use or dealing of drugs, etc. Most universities have specific policies or practices which would spell out that such conduct, without "progressive" discipline, is generally cause for immediate discharge.

On the other hand, if criminal misconduct occurs off duty, or off campus, then the extent to which the university can regulate the conduct is largely dependent upon whether the university has promulgated policies putting employees on notice that such off duty conduct will subject them to employment consequences. An employer has the right to promulgate and enforce reasonable work rules. For example, the university could have a policy stating that conviction of a felony or crime involving moral turpitude, which impacts upon employees' credibility or ability to do their job, or which results in substantial adverse publicity to the reputation of the university, will subject employees to dismissal.

If employees were put on notice of such a policy, then a custodian who was convicted of dealing drugs, or a vice president for finance who was convicted of commercial fraud in private dealings, or a director or alumni relations who was convicted of criminal sexual misconduct could be disciplined or discharged under such a rule. In serious cases of such off duty criminal misconduct, where the employee needs to serve jail time, then absence from duty often is an obvious ground for dismissal that is directly related to employment. However, in the absence of a work rule covering off duty criminal conduct which may impact on one's employment, employees who have been convicted of egregious crimes (for example, a teacher who was imprisoned for murdering his wife with an ax) have sometimes successfully sought reinstatement after the jail time is served (the Michigan Court of Appeals held that this teacher's rights to reinstatement under the State Teacher Tenure Act were not extinguished by his conviction).

There have been numerous arbitration decisions which have examined the extent to which an employer can discipline or discharge an employee for criminal misconduct. The cases go both ways, and generally turn on the extent to which the employer can show a nexus to or impact upon the employment relationship, and if the crime has been committed off duty and off site, the extent to which the employer has promulgated a rule purporting to regulate such conduct. A summary of these decisions and principles to be gleaned from them follows.

1. General Comments.

a. Significant confusion exists concerning the circumstances under which an employer may impose discipline for charges or convictions of crime. Factors to consider include:

(1) Whether or not the criminal activity was work-related, both as to substance and location of the criminal activity;

(2) The work rules or contract provisions under which the discipline is imposed;

(3) Whether the employee was merely arrested, charged or indicted, as opposed to convicted;

(4) Whether the charge was later dismissed, or the employee was acquitted; and

(5) Whether the activity was a felony or a misdemeanor.

b. No objective, external standard exists according to which discipline may be imposed which can be applied to all employers. Arbitrators evaluate each case in isolation or in the context of the individual employer, and consider the factors above.

2. Discharge.

a. Nexus between criminal activity and employment.

(1) A discharge is likely to be overturned if no nexus is found between the crime and the employment, often despite a rule or contract provision permitting discharge. Social Security Administration, 80 L.A. 725 (1983); United States Postal Service, 82 L.A. 522 (1979); Nugent Sand Co., 71 L.A. 585 (1978); Rexall Drug Co., 65 L.A. 1101 (1975). Contra, Martin-Marietta Aerospace, 81 L.A. 695 (1983). Similarly, if the criminal activity is related to the employment, the discharge is likely to be upheld. Corn Belt Electrical Co-op, 79 L.A. 1045 (1982); New York Division of Criminal Justice Services, 79 L.A. 65 (1982); Joy Manufacturing Co., 68 L.A. 697 (1977).

(2) If the crime was well publicized and the employer identified, the discharge is more likely to be upheld, in effect establishing a nexus by virtue of the publicity. Trailways Southeastern Lines, Inc., 81 L.A. 712 (1983). Similarly, if the employee does not represent the employer in public, the discharge may be overturned. Rexall Drug Co., 65 L.A. 1101 (1975).

b. The fact of an unambiguous rule specifying discharge for conviction of a crime, even if restricted to conviction of a felony or "serious offenses or crimes", will not consistently be upheld in arbitration. If the rule or contract provision specifies discharge for "serious offenses," for example, vehicular homicide may not be sufficient to support a discharge. The varying offenses considered "serious" by the employer may fail to support a discharge, on the basis of disparate treatment. Aaron Beacon Journal Company, 85 L.A. 314 (1985). On the other hand, discharge for conviction of first degree robbery was upheld under a rule specifying discharge for "major" crime. Air France, 75 L.A. 1113 (1978).

c. Discharge for theft.

(1) Under a company rule providing for discharge for "proven dishonesty", a discharge for a conviction of robbery or theft may or may not be upheld. Safeway Stores, Inc, 74 L.A. 1293 (1980); Great Scott Food Stores, 73 L.A. 147 (1979). However, in Means Services, Inc, 81 L.A. 213 (1983) where the rule permitted discharge for dishonesty, and the employer did discharge the employee, a guilty plea to theft and a subsequent dismissal did not result in discharge even where the arbitrator agreed that dishonesty was established, where the long-term employee had a good work record. Dishonesty is always arguably related to one's employment but the cases are not uniform in their approach to this issue. Safeway Stores, Inc, supra; Great Scott Food Stores, supra.

(2) Thefts of company property, on the other hand, are always related to one's employment, and a discharge will almost always be upheld. Clark Oil and Refining Corp, 73 L.A. 702 (1979).

d. Dishonesty relating to applications for employment which deny prior criminal activity but where the employee had prior arrests or convictions may or may not support discharge. Labor Management Services Administration, 80 L.A. 250 (1983); Huntington Alloys, Inc, 74 L.A. 176 (1980); Atlanta Gas Light Co, 65 L.A. 1084 (1975); Kaiser Steel Corp, 64 L.A. 194 (1975).

e. A discharge is more likely to be sustained if the rule under which it was imposed was negotiated rather than unilaterally implemented. Nugent Sand Co, 71 L.A. 585 (1978); Consolidated Papers, Inc, 66 L.A. 1256 (1976).

B. THE NATURE OF THE INVESTIGATION TO BE CONDUCTED AND ITS COORDINATION WITH THE CRIMINAL JUSTICE PROCESS

If an employee's conduct arguably violates both an institution's policies and a criminal statute, then the employer is faced with a thorny decision as to how to proceed. The path of least resistance is to simply turn the entire matter over to the police, the prosecutor, and the courts. An employer can (and many do) suspend the employee with or without pay pending the outcome of the court proceeding, and leave the employee's fate up to the jury. If the employee is suspended without pay, and if an employee has due process rights, then the employer must at least conduct a Loudermill "mini hearing" prior to the suspension (see II.A. above).

There are serious disadvantages to this course of action which should at least be considered before abdicating to the criminal justice process. The first is that you as the employer lose control over the process and outcome. The second is that there is a radically different standard applied by judges or juries, compared to the decision maker on your campus, or even to an arbitrator. The "beyond a reasonable doubt" standard applied by a judge or jury is far more liberal to the employee than the standards most employers would apply (something like "a reasonable basis for concluding") or even most arbitrators (although the employer has the burden of proof, it is generally by a preponderance of evidence).

Campus public safety (if you have such a department) is obviously an excellent choice to conduct or consult with regarding your investigation if you decide to proceed independently of the local prosecutor. Campus public safety officers generally have good relationships with local law enforcement agencies, and to the extent that police reports, etc., become public documents, campus officers are the best source to coordinate any acquisition of such documents. Where the crime relates to a person rather than property, securing the cooperation of any victim or eyewitnesses for your internal proceeding is essential, and such efforts should obviously be coordinated with local law enforcement officials. Victims/witnesses are frequently very willing (sometimes eager) to testify at both your internal proceeding and at the criminal trial.

C. CONTRABAND

Remember that if any internal investigation turns up items of contraband that are unlawful to possess (e.g., illegal drugs), the university has an obvious duty to promptly turn such items over to law enforcement officials.

D. REQUESTS FOR DEFERRAL OF CIVIL PROCEEDINGS UNTIL CRIMINAL PROSECUTION IS COMPLETED

If conduct violates a university policy and a criminal statute, and the university decides to begin with internal civil dismissal proceedings, and parallel criminal proceedings are instituted, the university may (but not always will) face a request by the employee to defer the civil proceedings until after the criminal proceedings have run their course. Some courts have held that the paramount nature of an individual's liberty interest, coupled with the privilege against self-incrimination, requires such a request to be granted. Unless required by policy or state statute, employers should negotiate (or stipulate in the event of failure to achieve agreement) that the employer will not be responsible for any back pay exposure occasioned by the delay in its internal proceedings.

For those campuses with public safety officers that have "sworn" powers like police officers, there may be an exception to this rule when the police officer is charged with criminal misconduct. The Supreme Court, in Garrity v. State of New Jersey, 385 U.S. 493 (1967), held that police officers can, in an internal civil investigation, be ordered to tell the truth about alleged involvement in criminal activities, with the stipulation that any responses made cannot be used in subsequent criminal proceedings.

E. IMPACT OF ARREST OR INDICTMENT

Obviously, the mere fact that an employee is arrested or indicted, without any further independent investigation, is not grounds to discipline or discharge. If the employee is jailed, and is absent from duty, then the absence may be grounds for discipline or dismissal (e.g., some staff collective bargaining agreements provide that it is grounds for dismissal to not report for duty without an excused absence for three days).

F. IMPACT OF EXTERNAL LAWS AND COLLECTIVE BARGAINING AGREEMENTS

An employer's ability to discipline or discharge for criminal misconduct, whether on or off duty, will be enhanced by a carefully drafted policy that specifies what conduct is to be regulated, and puts employees on notice that the employer may discipline or discharge for such conduct. A rule that provides that an employee may be subject to discipline up to and including discharge for violation or conviction of any local, state, or federal criminal statute where the violation or conviction impacts the employee's credibility or ability to do his or her job, or which results in negative publicity to the university, is an example of a broad notice which gives the employer reasonable flexibility to administer appropriate discipline on a case by case basis. If work rules are negotiated with a union, then such a rule should be part of the collective bargaining agreement.

VI. SEXUAL MISCONDUCT: ON AND OFF DUTY

Colleges and universities have universally accepted the notion that sexual harassment, whether by professors against students, or by supervisors against employees, is both unlawful and unacceptable from any conceivable policy standpoint. Although the extent to which a university can or should regulate consensual sexual relationships does not enjoy such widespread consensus, numerous institutions have adopted policies purporting to regulate certain consensual sexual relationships.

The imbalance of power inherent in even consensual relationships between professors or students, or supervisors and subordinates, as well as the practical policy problems which result when a consensual relationship breaks up, or from the alleged discriminatory impact of such a relationship on other students or employees who do not enjoy such preferred status, give rise to important reasons for considering regulation of such conduct. For a representative illustration of the problems that can be created by consensual sexual relationships, see Naragon v. Wharton, 737 F.2d 1403 (5th Cir. 1984) [plaintiff female graduate student sued three Louisiana State University administrators because she felt her failure to be given any teaching responsibilities was due to a consensual sexual relationship she had previously engaged in with a freshman female student]; Korf v. Ball State University, 726 F.2d 1222 (7th Cir. 1984) [male tenured professor defended dismissal for sexual harassment of students in part on basis that at least one of his relationships with a student had been consensual]; and Bougher v. University of Pittsburgh, 713 F.Supp 139 (W.D. Pa. 1989, aff'd, 882 F.2d 74 (3rd Cir. 1989) [after seven year relationship with professor "went sour," student sued university and professor under Title IX].

Universities which have adopted policies regulating consensual sexual relationships have generally drawn the line at situations where the professor has some current academic relationship with the student (classroom, advising, etc.), and such a line appears to be a reasonable one.

Employers in general have sometimes adopted policies regulating consensual sexual relationships between employees and subordinates, which in their more reasonable form, provide that in the event of such relationship, the supervisor should not evaluate the employee or make other employment decisions. As a practical matter, such policies are difficult to enforce, and serve primarily as something to reference in the event that such relationships cause problems which surface in the workplace.

There is a growing body of arbitration decisions which have sustained the discharge of an employee for sexual harassment, which include The University of Missouri, 78 L.A. 417 (Yarowsky, 1982); Tampa Electric Company, 88 L.A. 791 (Vause, 1986); Schlage Lock Co., 88 L.A. 75 (Wyman, 1986); Porter Equipment Co., 86 L.A. 1253 (Liberman, 1986); New Industrial Techniques, 84 L.A. 915 (Gray, 1985); Rockwell International Corp., 85 L.A. 246 (Feldman, 1985); United Electric Supply Co., 82 L.A. 921 (Madden, 1984); Zia Company, 82 L.A. 641 (Daughton, 1984); Borg-Warner Corp., 8 L.A. 985 (Neas, 1982); Anaconda Copper Co., 78 L.A. 690 (Cohen, 1982); St. Regis Paper Co., 74 L.A. 1281 (Kaufman, 1980); Dover Corp. 78-2 ARB Par.8465 (Haemmel, 1978); CPC international Inc., 62 L.A. 1272 (Larkin, 1974); Gerber Products Company (Brown, FMCS No. 90-05209, October 4, 1990).

Cases in which a discharge was reduced to a suspension or overturned, or in which a suspension was not sustained, include Federal Aviation Administration, 87 L.A. 697 (D'Spain, 1986); County of Ramsey, 86 L.A. 249 (Gallagher, 1986); Sugardale Foods Inc., 86 L.A. 1017 (Duda, 1986); King Soopers, Inc., 86 L.A. 255 (Sass, 1985); Hyatt Hotels Palo Alto, 85 L.A. 11 (1985); Washington Scientific Industries, 83 L.A. 824 (Kapsch, 1983); Meijer, Inc., 83 L.A. 570 (Ellman, 1984); Veteran's Administration Medical Center, 82 L.A. 25 (Dallas, 1984); Louisville Gas & Electric, 81 L.A. 731 (Stonehouse, 1983).

In Veterans's Administration Medical Center, 87 L.A. 405 (1986), Arbitrator Yarowsky sustained a suspension even though the victim did not appear at the hearing, contrary to the holding of Arbitrator Dallas cited above.

VII. MISCONDUCT REGARDING ALCOHOL: ON AND OFF DUTY

Employers should carefully draft policies regulating alcohol. Depending upon an employee's job classification and the predilection of the employer, consideration should be given to prohibition of the use of or possession of alcoholic beverages while on duty, or being under the influence of alcohol on duty, or reporting to work under the influence of alcohol.

Although the Rehabilitation Act of 1973 and the Americans with Disabilities Act provide for a certain degree of alcoholism as a protected disability, it is clear from the text and legislative history of the ADA, and the text of the EEOC's Americans With Disabilities Act Technical Assistance Manual (see Chapter VIII -- Drug and Alcohol Abuse) that an employee's on duty misconduct or lack of performance due to use of alcohol is a legitimate ground for appropriate discipline.

VIII. MISCONDUCT REGARDING DRUGS: ON AND OFF DUTY

An employer generally has the right to use pre-employment drug testing of applicants for controlled substances, even though failure to hire for a positive drug test often involves off duty conduct. A number of basic steps should be taken before the implementation of such testing:

- The employer should determine whether its concerns about drug use in its work force justify the cost of a testing program;

- A clear, written testing policy should be formulated and communicated to applicants, and the application form should contain a specific statement indicating the applicant's acknowledgement that a drug test may be part of the application process;

- Particular testing methods which are reliable and match the employer's individual needs should be adopted;

- The testing procedure should include a confirmation test where the initial test is a positive one;

- The testing should not be random or spotty; if any applicants are to be tested, all applicants should be tested in order to avoid any claims of discrimination;

- The testing procedure should be one which protects the individual's privacy, and the results of the test should not be revealed to anyone other than those who have an immediate need to know the test results;

- If employees are unionized, the NLRB and various state public labor relations agencies have held that drug testing for applicants are not mandatory subjects of bargaining, but that drug testing programs for current employees are mandatory subjects of bargaining.

Drug testing for public sector employees (i.e., not applicants) has been held to be a search which public employees may challenge as violative of their Fourth Amendment rights. Drug testing, without a warrant, may be compelled where the governmental interest is strong enough. The governmental interest may be compelling where there is a reasonable individualized suspicion of drug use or where the employees occupy safety sensitive positions, such as bus driver or heavy equipment operator. See Skinner v. Railway Executives' Ass'n, 489 U.S. 602 (1989); National Treasury Employees Union v. VonRaab, 489 U.S. 656 (1989).

The Americans With Disabilities Act excludes from its protections persons who currently use illegal drugs. However, "persons addicted to drugs, but who are no longer using drugs illegally and are receiving treatment for drug addition or who have been rehabilitated successfully are protected by the ADA." EEOC Americans With Disabilities Act Technical Assistance Manual, January 1992, Chapter VIII, Section 8.5.

Under the federal drug-free workplace and drug-free schools legislation, employers are required to promulgate policies regarding employees' conduct regarding drugs. See Drug-Free Workplace Act of 1988, 41 U.S.C. § 701 et seq and Drug-Free Schools and Communities Act Amendments of 1989, 20 U.S.C. § 2701 et seq.

IX. SCIENTIFIC MISCONDUCT

This is seemingly an increasingly frequent area of misconduct on campus. For the National Science Foundation's definition of misconduct, see 45 CFR 689.1. For the Public Health Service's definition, see 42 CFR 50.102. For an excellent and comprehensive recent treatment of this subject, see "Managing Allegations of Research Misconduct In Federally-Supported Research Programs," by Philip Burling and Kathryn A. Matthews of the Boston, Massachusetts firm of Foley, Hoag & Elliot, presented at the NACUA Annual Conference on June 29, 1992.

X. VIOLENCE IN THE WORKPLACE

This topic is perhaps the "hottest" area of misconduct in terms of media coverage and employer and employee apprehension. Since this is the subject of a concurrent session at this conference, presented on June 27 from 9:00 to 10:15 by David M. Birnbaum and Chris Hatcher, it will not be treated here.

XI. SEARCHES FOR EVIDENCE OF MISCONDUCT

The Supreme Court, in O'Connor v. Ortega, 480 U.S. 709 (1987), held that public employers must balance the employee's legitimate privacy expectations against the government's need for supervision, control, and the efficient operation of the workplace. The standard is one of reasonableness. Reasonableness is measured by: (1) the search must have been justified at the inception; and (2) the search as actually conducted must be reasonably related in scope to the circumstances which were the basis of the search in the first place.

As to private employers, some cases have held that employees have privacy rights in personal items such as purses, and in personal spaces, such as locked desks. If the university wants to reserve the right to search spaces which might be considered personal (desks, lockers, etc.), it should adopt a policy putting employees on notice that this may happen.

XII. MAKING THE DECISION REGARDING MISCONDUCT

A. Consider:

1. Is the investigation complete?
2. What facts have been established
3. Is the misconduct related to employment?
4. Does "just cause" for discipline exist?
5. How serious was the infraction?
6. What is the range of discipline that can be considered?
7. What is the employee's past record?
8. Remediation?
9. What discipline have you imposed in the past for similar misconduct?
10. How will the discipline affect other employees? Labor relations?
11. Are there mitigating circumstances?
12. Has the accused been treated fairly?
13. Have at least two administrators considered the fairness of the contemplated action?

B. Consider Meeting with the Accused: Again

Give the accused one last chance to explain, discredit, mitigate, or discount the damaging evidence.

C. Decide and Dispose

Follow up with a memorandum or letter which contains:

1. The nature and substance of the charge(s) and evidence.
2. How the employee responded.
3. The conclusions you have made.
4. What happens to the employee now -- warning/reprimand -- suspension -- last chance agreement -- termination.

XIII. CONCLUSION

Employers faced with litigation over wrongful dismissal do not receive juries of their "peers." The jury remembers how some employer somewhere unjustly treated one of them, or a relative, or a friend. Fair treatment of employees in the process of consideration and administration of discipline or dismissal for misconduct will be the best defense to any legal challenge.

EMPLOYEE MISCONDUCT – ON & OFF DUTY

June 26-29, 1994
Stephen J. Hirschfeld
McKenna & Cuneo
San Francisco, California

I. THE IMPORTANCE OF DEVELOPING EFFECTIVE INVESTIGATION SKILLS

As an employer, every university should strive to treat its employees fairly. Fair treatment - for example - making employment decisions without regard to race, color, religion, sex, sexual orientation, national origin, ancestry, marital status, medical condition, pregnancy, age, physical or mental disability or veteran status - is an essential statement about the institution's values.

We all know that no matter how hard we try to treat people fairly, there are going to be times when someone feels he or she was treated unfairly. When an employee feels his or her rights have been trampled on, or that university policies or guidelines have not been applied in an even-handed manner, it is essential that your institution, and frequently, the Human Resources Department and in-house legal staff, be prepared to conduct a comprehensive, objective and professional investigation. It is the investigative process that will permit your institution to monitor itself - to see to it that your administrators, faculty members, managers, supervisors and employees are complying with both the letter and the spirit of federal and state laws, as well as your internal policies and guidelines.

Conducting an objective and thorough investigation minimizes the risk that an employee is disciplined or terminated for something he or she didn't do. Perhaps things are not as they initially seemed. If this turns out to be true, the university will have avoided making what could have been a devastating and costly decision.

The purpose of an investigation is to gather facts so that you can make a credible determination as to what happened in a given situation. If someone is thought to have violated a policy, guideline, or procedure, conducting an effective investigation helps reach a conclusion that is based on the best facts available. Having accurate facts leads to a sound conclusion.

Conducting an effective investigation is an *acquired* skill. People who conduct investigations with skill know how to ask questions; they know how to extract information from people who are reluctant to communicate. It is a skill to sort relevant from irrelevant details and to be comfortable making credibility resolutions. People who conduct investigations with skill will be secure in the knowledge that the people involved were treated objectively and fairly, i.e., the way the person conducting the investigation would want to be treated in the same situation.

II. AN EMPLOYER'S BURDEN OF PROVING MISCONDUCT AS PART OF AN INTERNAL INVESTIGATION

A. **Proof of Misconduct**

For most employers faced with the decision of whether or not to terminate an employee for alleged misconduct, "proving" in the judicial sense of the word, (i.e., by establishing "beyond a reasonable doubt" or with a "preponderance of the evidence"), that the misconduct actually occurred is neither practical nor plausible. Employers conducting internal investigations generally do not have the resources, time or experience to conduct the kind of extended discovery that occurs in court litigation. Fortunately, the majority of the courts recognize that imposing judicial-like burdens of proof upon employers making decisions in the work place is not legally required. However, the same courts agree that an employer's investigation and decision must be judged by some standard to insure that its actions are not arbitrary, capricious or illegal.

The standard which has been adopted by most jurisdictions for judging an employer's decision to terminate an employee for alleged misconduct is one that derives from the notion of what is termination for "good cause."(See, *Pugh v. See's Candies, Inc.*, 203 Cal. App. 3d 743 (1988) [in a wrongful discharge action by an employee based on breach of contract, good cause for termination means a fair and honest cause or reason regulated by the good faith of the employer.]; *Crosier v. United Parcel Service, Inc.*, 150 Cal. App. 3d 1132 (1983) [the good cause determination needs to balance management discretion against the interest of the employee in maintaining employment]) The standard can be paraphrased as follows: in order for an employer to terminate an individual for alleged misconduct the employer must make a good faith determination that sufficient cause existed based on reasonable grounds.

The rationale behind this standard is best explained by the New Mexico Supreme Court's decision in *Kestenbaum v. Pennzoil*, 108 N.M. 20 (1988). The plaintiff in *Kestenbaum* was employed by Pennzoil as Vice President in charge of Guest Operations at Vermejo Park, a secluded ranch Pennzoil owned in northern New Mexico. In an anonymous letter to Pennzoil management, Kestenbaum was accused of sexual harassment, illegal conduct and mismanagement of the ranch. Pennzoil initiated an investigation into the allegations. After interviewing past and present female employees, the internal investigators presented a report summarizing the evidence. Kestenbaum was then confronted with the allegations of sexual harassment, the results of the investigation, and the opportunity to comment about each of the persons implicating him as well as to name witnesses to speak on his behalf. Throughout the entire process Kestenbaum maintained his innocence. Yet, his employment was still terminated based on the alleged sexual harassment. Id. at 22.

Kestenbaum sued Pennzoil for breach of employment contract claiming that he was terminated without a fair investigation and consideration of the allegations for which he maintained he was innocent. Pennzoil maintained that Kestenbaum was employed at-will, thus terminable at any time with or without cause. Furthermore, Pennzoil maintained that even if Kestenbaum was terminable only for cause, it had good cause for terminating him. The trial court found that Kestenbaum's employment was not terminable at-will, but rather subject to an implied contract to terminate only for good reason and that Pennzoil failed to prove a good reason. Id. at 21.

On appeal, Pennzoil argued that the jury should have been instructed that an employer who terminates an employee for alleged misconduct need not prove that the misconduct in fact occurred. Rather, Pennzoil advocated that "an employer need only in good faith believe that the employee engaged in conduct that was inappropriate in the work place." Id., at 27. While the Court agreed with Pennzoil that an employer need not prove that the employee actually committed the sexual harassment, the Court did not agree that the only alternative was to require the employer to show only a "good faith belief that the misconduct occurred." The Court held that proper standard by which to judge an employer's actions asks whether the employer "had reasonable grounds to believe that sufficient cause existed to justify the defendants' actions in discharging the plaintiff'." Id. (quoting *Crimm v. Missouri Pacific Railroad Co.,* 750 F.2d 703, 713 (8th Cir. 1984). The Court perceived this standard to be an objective middle ground between the employer's subjective "good faith belief" standard and the more rigorous judicial standard of proof of cause in fact.

Other wrongful termination cases, pre- and post-*Kestenbaum*, have articulated similar standards for judging an employer's decision to terminate an employee for misconduct.[1] (See , *Maietta v. United Parcel Service, Inc.,* 749 F. Supp. 1344, 1363. (D.N.J. 1990) [in which a United Parcel Service employee was terminated for allegedly falsifying and directing other employees to falsify production records]; *Crimm v. Missouri Pacific R. Co.,* 750 F.2d 703 (8th Cir. 1984)[employee terminated for alleged sexual harassment]; *Rulon-Miller v. International Business Machine,* 162 Cal. App. 3d 241, 253 (1984) [employee terminated for alleged conflict of interest; the court held that "probable cause" would have been some reasonable basis for assuming that a significant company interest was at stake; and *Simpson v. Western Graphics Corporation,* 293 Ore. 96, 643 P. 2d 1276 (1981) [employees terminated for allegedly threatening violence against another employee]). The only apparent distinction in the standards

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1/ While there are some cases which appear to impose merely the good faith standard (*Benishek v. Cody*, 441 N.W. 2d 399, 401 (Iowa, 1989)) or a standard based on mere suspicion (*Caldor Inc. v. Bowden*, 330 Md. 632, 646, 625 A. 2d 959 (Md. 1993)), only one case was found endorsing a higher standard than "good faith based on reasonable grounds." In *Scherer v. Rockwell Int'l.,* 975 F.2d 356, 359-360 (7th Cir. 1992), the employee's contract stated that the company could terminate him only if he was found *guilty* of gross default or misconduct, thus the court refused to apply the good faith based on reasonable grounds standard. However, the court implied that absent the employment contract provision providing for proof of actual guilt, the "good faith based on reasonable grounds" standard would have applied.

articulated by these cases is semantic. That is to say, some capture the objective arm of the standard with a different phrase than "reasonable grounds." For example, in *Maietta*, (749 F. Supp at 1363), the district court uses the phrases "substantial evidence," and "credible support," and in *Crimm*, (750 F.2d at 713), the court uses the phrase "reasonable basis." All these cases agree that whether or not the employer was *certain* that the misconduct occurred is not determinative. (See, *Maietta, supra; Simpson, supra; Crimm, supra*).

B. What Constitutes "Reasonable Grounds?"

As noted in *Kestenbaum*, the "reasonable grounds" standard is an objective one. Furthermore, based on the body of cases as a whole, the standard is one for which there is no set formula for evaluation. That is, whether or not the employer's determination was based on "reasonable grounds" must be evaluated on a case-by-case basis.

In evaluating whether an employer had "reasonable grounds" for terminating an employee for misconduct, the primary focus will be on the *quality* of the employer's investigation of the allegations. Based on *Kestenbaum*, it is clear that merely initiating and carrying out an internal investigation is not enough. As noted above, Pennzoil investigated the charges of sexual harassment against Kestenbaum by interviewing past and present female employees and giving him an opportunity to rebut the allegations. However, the court determined that the investigation and the standards of the investigators could not support a finding that Pennzoil acted upon reasonable grounds in dismissing Kestenbaum for alleged sexual harassment. First the court found that the results of the investigation were deficient because they failed to "differentiate between first-hand knowledge, attributed hearsay, or mere gossip or rumor and no attempt was made to evaluate the credibility of the persons interviewed." *Kestenbaum*, 108 N.M. at 28. Furthermore, the Court found that Pennzoil's investigator's did not observe the standards of good investigative practice" and that Pennzoil made no efforts to evaluate how the investigation was handled. Id. Thus, in conducting an internal investigation, employer's must adhere to a policy of "good investigative practices" as well as taking the time to adequately review the credibility and weight that ought to be given to the evidence gathered.

An example of a successful internal investigation is illustrated by United Parcel Services ("UPS") in *Maietta*, 749 F. Supp. (D.N.J. 1990). The plaintiff in *Maietta* was one of 15 employees terminated for integrity violations, including allegedly falsifying and directing other employees to falsify production records. The terminations were a direct result of a district wide investigation initiated by UPS. The internal UPS investigators interviewed over seventy UPS management and supervisory level employees over a one month period. Employees were interviewed separately at an off-site location to ensure confidentiality. Employees were also asked to sign written statements based on their interviews. Id. at 1353. The investigation file developed on Maietta contained allegations from a number of sources implicating him in wrong-doing and signed statements from two employee directly implicating Maietta in integrity violations. Maietta was interviewed and confronted with the allegations, which he denied. After reviewing Maietta's investigation file, his own interview statement and the statements of the two employees, the district manager decided to terminate Maietta. The Court found that UPS' investigation supported "a good faith determination that good cause existed to discharge Maietta as a matter of law." Id. at 1364. (See also *Crimm, supra* at 713, [Missouri Pacific presented substantial evidence that appellant was discharged for good cause based on: a rather detailed investigation; preparation of a formal investigation report; and seeking of advice from legal counsel.])

C. Negligent Investigation Claims

As noted above, when an employee challenges an employer's decision to terminate for alleged misconduct under a contract or statutory theory, the quality of the employer's investigation into the alleged misconduct becomes the key issue. It should also be noted that there are a growing number of cases by employees terminated for alleged misconduct which actually assert negligent investigation as a distinct cause of action against employers. (See, *Chase v. Weight, et. al.*, 1989 U.S. Dist LEXIS 9877, 11 (D. OR. 1989); *Ashway v. Ferrellgas, Inc.*, 1989 U.S. Dist. LEXIS 18317, 5, 59 FEP 375 (1989); *Vackar v. Package Machinery Co.*, Daily Appellate Reports 1764 (2/11/1994) (N.D.Ca.)). The case law on such claims is not well developed, but it appears that such claims are potentially viable. For example, in *Chase v. Weight, et. al.*, 1989 U.S. Dist LEXIS 9877, 11 (D. OR. 1989), the district court denied defendants motion to dismiss a claim of negligent investigation for failure to state a claim upon which relief can be granted. Just months earlier, in a more lengthy discussion, an Arizona federal court reasoned that the public policy underlying the prohibition against sexual harassment in the workplace and the requirement that an employer investigate promptly allegations of sexual harassment, should be read to create an obligation which protects both the complainant and the accused. *Ashway v. Ferrellgas, Inc.* , 1989 U.S. Dist. LEXIS 18317, 5, 59 FEP 375 (1989). Furthermore, the *Ashway* court stated the duty to investigate could also be implied from the common law duty to use care to avoid or prevent injury to individuals. Id. at 7. However, the *Ashway* court went on to state in *dicta* that an employer's incorrect conclusion that an employee engaged in sexual harassment, does not necessitate the conclusion that the employer's investigation was inadequate. (See also, *Lawson v. Boeing Co., 58 Wash. App, 261,* 265 (1990) [court was willing to assume that Boeing owed a duty to conduct a reasonable investigation, but rejected employee's negligence claim for lack of "evidence establishing the standard of reasonable investigation [sic] or to show a breach thereof."]). Thus, even if an employee can successfully prove that an employer incorrectly determined that they engaged in misconduct, the employee will need to show something more to sustain a negligent investigation claim.

D. Defamation Claims

Defamation is another often plead claim by employees terminated for alleged misconduct. Specifically, they claim that they have been defamed by the employer's false accusations of misconduct. Most jurisdictions maintain that an employer has a *qualified* privilege to make statements about employees in the work place if the statements are made: (1) in good faith; (2) on a subject that the party communicating the information has an interest; and (3) the information is communicated to individuals having a corresponding interest. (See, *Clements v. Ryan,* 382 So. 2d 279 (La., 1980); *Benishek v. Cody*, 441 N.W. 2d 399, 402 (Iowa, 1989); *Lawson v. Boeing Co.*, 58 Wash. App, 261, 267 (1990)). If these elements are established, the employee cannot prevail merely by showing that the statements were actually false; rather, the employee must show that the employer or investigating employees made the statements regarding the misconduct *with malice* - knowledge or reckless disregard as to the truth or falsity of the statements. While the malice standard uses different terminology than the "good faith reasonable grounds" standard, it essentially holds an employer to the same level of scrutiny. That is to say, employer's *need not prove* that the allegations of misconduct are true. An employer can prevail by showing good faith in making the communication. This good faith is established by showing that the party adequately investigated the allegations and expressed their opinion based on the investigation. (See, *Lawson*, 58 Wash. App. at 267 and *Benishek*, 441 N.W. 2d at 401). Certainly the best way to avoid these claims is to strictly limit disclosure of allegations made and evidence gathered during the investigation to only those individuals with a *legitimate need to know* that information.

E. **Conclusion**

The majority of the cases surveyed indicate that in order to justifiably terminate an employee for misconduct, an employer need not prove, in fact, that an employee actually engaged in the misconduct. Rather, the employer need only make a good faith determination that good cause existed based on reasonable grounds. Reasonable grounds is analogous to a "reasonable basis," and/or a "reasonable investigation," and would need to be supported by "credible support" or "substantial evidence."

An employer who wants to ensure that its investigation is carried out in good faith and its determination is supported by objectively reasonable grounds should at minimum:

1. Develop and implement thorough investigation procedures;
2. Identify and train all individuals who may be called upon to carry out an internal investigation;
3. Require thorough and complete documentation of the investigative process; and
4. Ensure that the investigation contains:
    - a) Thorough interviews of the complainant, accused and necessary witnesses;
    - b) Analysis of all relevant evidence;
    - c) Assessment of the credibility of the witnesses and strength of the evidence;
    - d) Rational and defensible conclusion.

III. INTERNAL INVESTIGATION CHECKLIST

A. Your Initial Meeting With The Employee Raising The Issue

1. Be Sure The Person Raising The Issue Is Comfortable With Your Handling Any Investigation.

2. When Conducting Your Initial Interview, Get The Facts - *Who, What, When, Where, Why and How.*

B. Determining If An Internal Investigation Is Needed

1. Will A Single Answer Resolve The Issue?

2. Are Other Employees Involved?

3. Do You Need More Facts Than The Employee Is Able To Provide?

4. Do You Need The Help Of Any Other Resource In Order To Reach A Conclusion?

C. Determining The Nature Of An Issue Before Initiating An Investigation

1. Identify What The Employee Is Complaining About (e.g., Which University Policy, Guideline Or Procedure).

2. Determine What The University's Obligations are With Respect To Resolving The Issue(s).

3. Decide Who Else Is Necessary To Assist You In Resolving The Issue(s).

D. Planning The Investigation

1. Determine What Policies, Guidelines Or Practices Apply To This Situation.

2. Obtain All Relevant Documents That Will Assist You In Conducting Your Investigation.

3. Determine Who Is Suited To Conduct This Investigation.

4. Decide Who You Should Interview.

5. Decide The Order Of Your Interviewees.

6. Determine If Any Interim Actions Are Necessary Before You Initiate The Investigation.

7. Outline The Questions You Will Ask And Areas You Will cover.

E. Conducting The Actual Investigation

1. Anticipate The Questions That Each Of Your Interviewees Will Ask.

2. Before You Begin The Interview, Be Prepared To Explain What You Are Investigating, Why The Interviewee Is Being Interviewed And How The Information Obtained Will Be Used.

3. Remember To Stress That No Conclusion Has Yet Been Reached.

4. Be Sure To Emphasize The University's Policy Regarding Confidentiality And Retaliation.

F. Conducting An Effective Interview

1. Give The Person Who Is The Focus Of The Investigation A Detailed Account Of The Claim.

2. Obtain The Interviewee's Detailed Account Of The Events Surrounding The Claim.

3. Get As Much Information As Possible From The Interviewee.

    a) Understand What Policy Or Guideline Forms The Basis Of The Issue.

    b) Understand What Facts Are Necessary To Reach A Conclusion.

4. Effective Techniques For Asking Questions.

    a) Outline The Issues And Facts You Need To Cover And Draft A Preliminary List Of Questions, as appropriate.

    b) Save Unfriendly Or Embarrassing Questions Until Rapport Has Been Established.

    c) Don't Begin With Hostile Or Tough Questions.

    d) Start With "Broad" Questions And Then Use Follow-up Questions As Needed.

    - e) Do Not Put Words Into The Interviewee's Mouth.
    - f) Ask The Tough Questions.
    - g) Go Beyond Your Pre-Planned Questions.
    - h) Ask Questions Designed To Elicit Relevant Facts.
    - i) Ask Who, What, When, Where, Why, And How Type Questions.

G. Before Closing The Interview

1. Relate The Seriousness Of The Investigation.
2. Remind The Interviewee Of The Confidentiality Of The Investigation.
3. Ask If There Is Anyone Else You Should Talk To.
4. Review The Interviewee's Answers With The Interviewee.
5. Encourage The Interviewee To Come Back With Any Additional Information And/Or Documents.

H. Assessing Credibility

1. Make Notes That Will Help Assess Credibility As Soon As The Interviewee Leaves.
2. Review The Interviewee's Chronology Of Events.
3. Note The Interviewee's Demeanor.
4. What, If Any, Admissions Were Made During The Interview?
5. Did The Interviewee Deny Anything?
6. Were There Conflicting Statements Made?
7. Was The Interviewee's Explanation Plausible?

I. Making A Recommendation After Completing Your Analysis

1. Were Any Of The University's Policies, Guidelines Or Practices Violated?

2. Is The Violation Serious Or Minor?

3. Do Any Local, State, Or Federal Laws Require You To Take Certain Actions?

4. What Is The Employee's History At Your Institution Regarding Length Of Employment, Prior Complaints And/Or Problems, Performance, Etc.?

5. What, If Any, Factors Would Mitigate Against Instituting Discipline In This Case?

6. Follow-Up As Appropriate.

J. Complying With Your Institution's Policies Regarding Documentation

1. Review The Documentation Guidelines To Be Sure You Have Documented Your Investigation Properly.

2. Distribute Your Findings And Conclusions To Appropriate People Pursuant To Your Institution's Guidelines.

3. Be Sure That The "Personnel Files" Of The Employee Raising The Issue And The Employee Who Was The Focus Of The Issue Are Appropriately Documented.

K. Utilizing And Consulting With Counsel

1. Should In-House Counsel Be Consulted?

2. Will In-House Counsel's Role Be As Counselor Or Active Investigator?

3. Should Outside Counsel Be Consulted?

4. Make A Decision On Attorney-Client Privilege And Work Product Ahead Of Time.

VIOLENCE IN THE WORKPLACE

June 26-29, 1994

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I. SCOPE OF THE PROBLEM

A. The Statistics And Costs

It is no secret that the workplace is no more immune from violence than other parts of our society. According to a nationwide survey by the Northwestern National Life Insurance Company, over two million assaults occur annually in the workplace. In October 1993, the Bureau of Labor Statistics of the United States Department of Labor announced that homicide is the second leading cause of job-related deaths nationwide; for working women, homicide is the leading cause of occupational death.

A few recent examples, covering a six-week period:

On March 14, 1994, a former employee of Extron Electronics in Santa Fe Springs, California, went on a rampage, shooting and killing three co-workers and wounding two others before killing himself. He allegedly had been dismissed for unsatisfactory performance.

On March 8, 1994, at Ford Motor Company in Dearborn, Michigan, a supervisor was stabbed several times when presenting a list of infractions to a subordinate, including tardiness and abuse of sick leave.

On February 15, 1994, at a Wendy's restaurant in Tulsa, Oklahoma, an employee showed up with a semiautomatic handgun and shot six co-workers. He apparently had an unrequited romantic interest in one of the victims.

Two weeks earlier, at a Taco Bell in Clarkesville, Tennessee, a worker shot and killed four fellow workers in a robbery attempt.

Workplace violence includes not just homicide, but assaults, threats and verbal abuse. The impact of these experiences on employees results in trauma, reduced productivity, absence from work, lowered morale, workers' compensation claims, increased insurance costs, and, in some cases, sizable civil judgments against employers in the courts. The National Safe Workplace Institute estimates that in 1992 the total costs to employers for workplace violence was $4.2 billion.

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[1] This outline has been adapted in large part from materials prepared by the national law firm of Littler, Mendelson, Fastiff, Tichy & Mathiason. A comprehensive treatment of the subject has been published by the firm in the form of a handbook entitled, "Terror and Violence in the Workplace." Copies are available from the office of Garry G. Mathiason, Littler, Mendelson, Fastiff, Tichy & Mathiason, 650 California Street, San Francisco, CA 94108.

B. Legal Liabilities Associated With Workplace Violence

1. The Federal Occupational Safety and Health Act (Fed-OSHA)

Fed-OSHA requires employers to provide their employees with a safe and healthful place of employment. (29 U.S.C. § 654(a)(1).) Many states have similar statutory requirements. (See, e.g., Cal. Lab. Code, § 6400.) Encompassed within these general provisions is the employer's obligation to take reasonable steps to protect the lives, safety and health of employees. Fed-OSHA has issued penalties including a proposed $5,000 fine to a Chicago hospital for failing to protect employees from violent patients. Fed-OSHA has also instructed its inspectors to cite workplaces where criminal activity endangers workers (January 13, 1994, speech of Joseph Dear of OSHA, reported in BNA's Workers' Comp. Rept., vol. 5, p. 27 (Jan. 31, 1994).) Consideration is being given in both federal and state Occupational Safety and Health agencies to promulgating regulations directed specifically to workplace violence. At least three workplace violence bills are currently under consideration in Sacramento, California.

2. Negligent Hiring

Many state courts have recognized the duty of an employer to protect its employees and customers from injuries caused by employees whom the employer knows, or should know, pose a risk of harm to others. This duty may be breached when an employer fails to investigate applicants, by checking references, for example, when such an investigation would have demonstrated that an applicant had a violent propensity or was otherwise unfit. See Medina v. Graham's Cowboys, Inc. (N.M. App. 1992) 827 P.2d 859. See also Connes v. Molalla Transp. Sys., Inc. (Colo. 1992) 831 P.2d 1316 (recognizing the tort of negligent hiring and noting that 14 other states have done so); Underwriters Ins. Co. v. Purdie (1983) 145 Cal.App.3d 57.

3. Negligent Supervision

The failure to properly supervise an employee, who then harms someone, may also result in liability, if the employer knows or should have known of the necessity for such supervision. See Degenhart v. Knights of Columbus (S.C. 1992) 420 S.E.2d 495; Bradley v. Guess (Colo. App. 1989) 797 P.2d 749 rev'd on other grounds; Seaward Constr. Co., Inc. v. Bradley (Colo. 1991) (employer held liable for failing to supervise a company

Christmas party at which employee sustained injuries in fight with supervisor); John R. v. Oakland Unified Sch. Dist. (1989) 48 Cal.3d 438 (student who was sexually molested by a teacher allowed to pursue a claim against the school district for negligent hiring and supervision).

4. Negligent Retention

Continuing to employ someone, once current violent tendencies become evident to the employer, may also give rise to liability. See Yonkers v. Honeywell, Inc. (Minn. 1993) 496 N.W.2d 419; Bryant v. Lisigni (1993) 250 Ill.App.3d 303.

5. Implied Obligations

Where employers have adopted measures to try to ensure a safe workplace, the measures themselves may give rise to an implied duty, which can be breached. For example, in California employers are now required to implement an Injury and Illness Prevention Program (Lab. Code, § 6401.7). Once the program is established, a duty to maintain a safe and healthful environment consistent with the program's provisions may be inferred.

In addition, courts may infer a public policy requiring employers to provide a safe and healthy working environment, based upon existing statutory obligations. See Hentzel v. Singer (1982) 138 Cal.app.3d 290 (sections 6400-6404 of the California Labor Code imply a public policy of providing a safe and healthy work environment for all employees). The courts may also infer a duty to warn, or otherwise attempt to protect, potential victims of violence. See Tarasoff v. Regents of Univ. of Cal. (1976) 12 Cal.3d 425 (therapist must warn intended victim if client presents a serious danger of violence).

Moreover, there may be an inclination in many courts to impose liability whenever there has been an injury, and a defendant appears to have failed to exercise reasonable care. The fore-seeability of the injury is a key to imposing liability. See J'Aire Corp. v. Gregory (1979) 24 Cal.3d 799, 805 (the court "has repeatedly eschewed overly rigid common law formulations of duty in favor of allowing compensation for foreseeable injuries caused by a defendant's want of ordinary care.") See also California Civil Code section 1714:

> "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself."

II. WARNING SIGNS OF A POTENTIAL FOR VIOLENCE

There is no precise profile that fits every individual who is prone to workplace violence. However, before violence occurs, there is often a pattern of escalation, during which one or more of the following signals may be given. These do not mean the employee will be violent, but they should heighten concern:

1. Threats of harm;
2. Intimidation of others;
3. Excessive interest in weapons;
4. Paranoia;
5. Moral righteousness;
6. Inability to take criticism;
7. Desperation over recent personal problems;
8. History of violence;
9. Fascination with incidents of workplace violence;
10. Disregard for safety of co-workers;
11. Obsessive involvement with the job, often with uneven job performance and no outside interests; and
12. Being a loner and having a romantic obsession with a co-worker.

Stressful workplace events, such as layoffs, terminations, and labor disputes can also increase the likelihood of violence.

III. RIGHTS OF THE ALLEGED PERPETRATOR

A. Defamation

False statements made by an employer about an employee's violent tendencies may be actionable, if unprivileged. A qualified privilege protects a statement where it was made with a good faith belief in its truth, where it served a legitimate business interest, and where it was published only to those with a need to know. To establish a good faith belief that an individual has violent tendencies, the employer should conduct a prompt investigation of the allegations, making sure that the employer's conclusions are based on reliable information from individuals with personal knowledge of the facts.

B. Invasion of Privacy

The right to privacy is protected by the federal and state constitutions. While an employer may properly investigate threats of workplace violence, it should do so based on reliable sources, and as unobtrusively as possible. Information should be shared only with those who have a need to know.

C. Wrongful Discharge

An employer should consider suspending an employee where a threat of violence appears serious, but a thorough investigation has not yet been completed. This reduces the threat of violence, without immediately discharging the employee.

In cases where the threat is nebulous and termination may not withstand challenge from a grievance or a lawsuit, the employer may want to negotiate a resignation.

D. The Americans With Disabilities Act (ADA)

Employees with mental difficulties may qualify as disabled under the ADA. The statute defines a disability as a physical or mental impairment that substantially limits one or more major life activities. (ADA § 3(2), 42 U.S.C. § 12102.) An emotional or mental illness qualifies as a mental impairment if it substantially limits a major life activity. Working is such a major life activity.

If an employee qualifies as disabled, the employer must consider whether it can provide the employee with a "reasonable accommodation," i.e., any accommodation which the employer can adopt without undue hardship. (42 U.S.C. § 12111.) The employer is not required to tolerate a direct threat by the disabled individual to his own or others' health and safety. (EEO Guidelines, 29 C.F.R. 1630.15(b)(2).)

Depending on the facts of an individual case, reasonable accommodation could include placing the employee on a leave of absence, pending review of his condition by medical professionals; attempting to vary job responsibilities; or a transfer to a different position. While termination may be permissible, employers should bear in mind that choosing such a course of action, rather than trying to negotiate a resignation package, including future medical treatment, could increase the risk of future violence.

IV. OPTIONS FOR DEALING WITH WORKPLACE VIOLENCE

A. Before There Is A Crisis

1. Form a Management Team

In considering what policies and procedures should be in place to address workplace violence, one very useful step is to designate a management team to deal with the issue. The team should consist of a representative from human resources, from the police or security personnel, from the legal department or someone with expertise in employment law, and, if available, a psychologist or psychiatrist with relevant expertise. The team can assess the current state of the employer's policies and resources, propose preventive steps, and adopt a plan for dealing with crises which may occur. The team can also focus on the education of managers and other supervisors so that they are able to spot potential problems and know where to turn. The team can act as the resident experts on workplace violence, so that others in the workplace know where to go when there are concerns. Such an approach will encourage the identification of potential problems, since supervisors and other employees will have somewhere to go when they are confronted with a problem. It also makes it possible for the employer to respond to potential problems consistently and thoughtfully.

The team can also serve as a liaison with other resources in the community, medical, police, and counseling experts, for example.

2. Thoroughly Pre-screen Applicants for Employment

At a minimum, an employer should check references, seek to verify information submitted by the applicant, and inquire into any gap in the employment history. While prior employers may decline to share much information, a record of having made the inquiry should help establish the reasonableness of the employer's conduct if there are future problems.

An employer may also be permitted to inquire about whether the applicant has ever been convicted of a felony, and the date, place, and nature of the crime, as long as the employer includes a statement that an affirmative answer will not automatically disqualify the applicant. The employer should first consult with legal counsel about such an inquiry, since certain restrictions may apply. In California, for example, an employer may not inquire about marijuana convictions more than two years old (Cal. Lab. Code, § 432.8.) Access to summary criminal histories, or "rap sheets," is also restricted in California (Pen. Code, § 111215.) Inquiries about arrests, as opposed to convictions, are not permitted (Cal. Lab. Code, § 432.7). Any decision-making based on prior convictions should focus on offenses that genuinely render the employee currently unfit for employment.

Whether the applicant currently uses illegal drugs or has done so within the recent past is also a legitimate inquiry. Applications should include an inquiry as to whether the applicant has, within the past 10 years, obtained or maintained a professional or vocational license for certification, and if so, the entity that issued the license and the dates of issuance.

Employers should request applicants' written consent to the employer's investigation of their employment history, references, and licensing information, as well as a criminal background check.[2] The applicant should agree in writing to the provision of such information to the employer by third parties, and execute a release of claims.

Psychological or physical screening, drug testing, fingerprinting, and other devices may be prohibited or highly restricted by the ADA and other federal or state laws. The employer should consult legal counsel before considering any such screening of applicants.

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[2] While "rap sheets" available to police departments may not be available to employers generally, county courthouse records are available.

3. Increase Physical Security Measures

Employers should have a security system that meets the security needs of their particular workplace. This may include controlling access to the workplace with electronic security systems, or by other means. Electronic locks have the advantage of being easy to re-program in the case of laid-off or fired employees who refuse to return their key cards. Offices that lock, improved lighting, an alarm system, and an emergency hotline may all be relatively inexpensive and advisable ways to improve the level of safety in the workplace. Local law enforcement personnel are often available to give security advice, based on their experience with other employers in the area. Establishing a relationship with local law enforcement officials can also improve the response time and receptivity to complaints from the employer regarding threats of workplace violence.

B. When There Is A Problem

Employees who pose a danger of violent behavior may "test limits" a number of times before they become violent. Their conduct may be a cry for help, a way of seeing if someone will stop them before they go any further. Thus, it is important to address threatening or other inappropriate or disturbing behavior when it occurs, rather than ignoring it, and hoping it will go away, as is sometimes the tendency.

Depending on the nature of the problem, immediate emergency action may be called for, or some other, intermediate approach may be appropriate. A range of options is set forth below, some of which will be appropriate in some circumstances, some in others.

1. Conduct an Investigation

The employer should seek to collect reliable information as quickly as possible by interviewing those with knowledge of the facts. If a threat has allegedly been made, for example, the employer should determine who made the threat, the specific language of the threat, against whom the threat was made, the time and place of the threat, any physical conduct by the threatening party that would tend to substantiate the seriousness of the threat, the names of any other witnesses, and any prior threats or violent conduct by the threatening party.

A determination should quickly be made about whether any action needs to be taken to protect the person who has been threatened; for example, warning the person, moving the person's workplace to a more secure area, and making special security arrangements.

Fairness requires that the accused individual be given a chance to tell his side of the story. Depending on the seriousness of the situation, some security measures may be appropriate even before confronting the accused. If a threat of violence is believed to be genuine, the interview with the accused could occur in the presence of security personnel.

It may also be appropriate to remove the accused from the workplace before a decision is made on what final action to take. This may be done in a number of ways, including placing the employee on paid leave, with medical benefits that would allow the employee to seek assistance. Counseling services may be offered by the employer. If the employee has grievance rights, he should be advised of these. If the leave is designated under the federal Family Medical Leave Act (FMLA), whether it is with or without pay, benefits will be available. The employee should be advised of this fact also.

Throughout the process it is important to be aware of the resources that may be available to help the accused, and to advise him of these resources. In addition, his rights must be observed, including his right to privacy. Restricting information to those with a need to know is therefore highly advisable.

It is helpful if the employer has established policies with respect to placing employees on paid or unpaid leave if they appear to pose a danger to themselves or others. Such policies may also provide for a medical and/or psychological examination, the results of which will be available to the employer, prior to allowing the employee to return to work.

If the accused employee does not appear fit to return to work, termination may be appropriate. Alternatively, the employer may want to seek to negotiate a severance package which might provide continued medical care for some period. This can serve the multiple purposes of removing a potentially dangerous employee from the workplace, avoiding grievances or lawsuits from the former employee, and lessening the likelihood of violence in the future from the former employee. Resources may also be available to the former employee through Social Security Disability programs, or through community mental health services. It is very useful to be able to advise an employee of these and other resources that may be available to help him deal with his problems.

2. Police Action

Where violence has already occurred, the matter should be referred to the police, of course. In some states, threats of violence are also criminal. (See Cal. Pen. Code, § 922.) Stalking or other forms of harassment placing the victim in fear of death or injury may also be criminal. (See, e.g., Cal. Pen. Code, § 646.9.)

Where individuals appear to pose an immediate risk of harm to themselves or to others, they may also be subject to involuntary detention for a psychiatric evaluation. California Welfare & Institutions Code section 5150, for example, authorizes a peace officer and certain professional persons to detain an individual for up to 72 hours for evaluation and treatment in a county-designated facility.

3. Restraining Orders

State law may provide for court orders restricting an individual's contact with a potential victim, including staying away from the workplace. While such orders do not by themselves prevent violence, they give the police a tool if the perpetrator comes into the workplace or otherwise approaches the victim. In addition, they can send a valuable message to the potentially violent individual that his conduct is unacceptable and will not be tolerated.

If consideration is given to seeking a restraining order, the victim needs to participate in the decision. Such orders may not always be appropriate, or it may be desirable to limit their scope. A restraining order which restricts access to the victim's residence, for example, will communicate the victim's address to the perpetrator, information which he may not otherwise have known.

4. Public Relations

Incidents of workplace violence generate enormous press interest. It is important to formulate a strategy quickly, ideally in advance, for dealing with the press. One or two individuals should be designated to respond to press inquiries. They should be kept "in the loop" as to what decisions are being made and how a situation is being handled. They should also be knowledgeable about the efforts the employer has made to make its workplace safe, the safety record of the employer in the past, and the prevalence of workplace violence generally around the country.

V. RESOLVING DISPUTES INTERNALLY

EXPANDING STATUTORY PROTECTION FOR WHISTLEBLOWERS

I. INTRODUCTION

During the 1980s, the widely reported examples of government contractors charging $1,500 for toilet seats and $600 for hammers, led Congress to enact a series of statutes to encourage and protect employees who disclose fraudulent contract claims. Not only have these laws provided protection to employees who have been discharged or discriminated against as a result of their "whistleblowing" activities, but some of these statutes actually provide a financial incentive to do so.

As a result of the 1986 reauthorization of the False Claims Act, whistleblowers who pursue claims against their employers on behalf of the government can pocket up to thirty percent of the total penalty. With False Claims Act penalties running as high as $10,000 plus three times the actual fraud, the windfall to a whistleblower can potentially run into the millions. Understandably, California, with $35 billion a year in defense contracts, is home to a disproportionate share of false claims litigation. It has been estimated that as much as a quarter of all the false claims cases nationwide come from California, with two-thirds of those involving defense contracts.

It is important to note, however, that whistleblower provisions are not limited to federal defense contracting. Over the last fifteen years, whistleblower protection provisions have been regularly adopted during the reauthorization of most major environmental statutes. Additionally, a number of states, most notably California, have also enacted whistleblower statutes to protect employees who report the violation of state and federal law.

Rather than be subject to multi-million dollar lawsuits, a number of corporations have decided to take a pro-active stance towards employee whistleblowing. A number of corporations are initiating confidential ombudsman programs to encourage the "in-house" disclosure of employee grievances and alarms. Instead of allowing employee whistleblowing to appear on 60 Minutes specials, or to be the subject of Congressional investigations, these corporations have decided to deal with the bad news before it goes public. Not only can these programs avoid a variety of public relations disasters, but more importantly, they also provide substantial savings in litigation costs.

The following summarizes some of the more significant whistleblower provisions which have been enacted during the last few years, outlines some illustrative cases and verdicts involving employee whistleblowing, and addresses pro-active steps to minimize these claims.

II. PROCUREMENT WHISTLEBLOWER PROVISIONS

In order to encourage the disclosure of procurement fraud, Congress has enacted three major statutes to protect whistleblowing employees.

A. False Claims Act,
31 U.S.C. § 3730(h)

Under the False Claims Act ("FCA"), employees who uncover fraudulent claims by their employer are allowed to bring suit on behalf of the government (called *qui tam* suits) to recover these claims. To encourage this type of activity, Congress included the following whistleblower provisions within the FCA.

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

31 U.S.C. § 3730(h) (1988).

The FCA is intended to provide a wide range of protection for employees in a *qui tam* action. This protection applies not only to employees who personally file an action, but also to those individuals who assist in an investigation of fraud, initiate or report a fraudulent claim, testify on behalf of the federal government, or lend any assistance in a suit under the FCA.

The whistleblower language under the Act is primarily intended to protect against discrimination by an employer "because of lawful acts done by the employee." *Id.* Due to the fact that the FCA was passed at the end of the 99th Congress, relatively little information is available about this provision beyond the fact that Congress did not want employees to benefit from their own unlawful acts. Nonetheless, the "lawful acts" standard would appear to protect employees from employment discrimination, except for their own unlawful conduct, regardless of the accuracy or justification for a claim that their employer had violated the Act.

Under the penalty provisions contained within this section, employers are not only required to reinstate the employee at their former seniority and pay status, but they are also liable for two times the amount of back pay, interest on the back pay, litigation costs and attorney's fees.

B. The Major Fraud Act, 18 U.S.C § 1031(9)

Under the Major Fraud Act ("MFA"), employees who disclose information on a fraudulent claim or contract (either for property or services) for $1,000,000 or more, are protected against retaliation from their employer. Similar to the protection provided under the False Claims Act, the MFA contains a broad shield for employee whistleblowing activities. The MFA provides:

> Any individual who --
>
> (1) is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by an employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of a prosecution under this section (including investigation for, initiation of, testimony for, or assistance in such prosecution), and
>
> (2) was not a participant in the unlawful activity that is the subject of said prosecution, may, in a civil action, obtain all relief necessary to make such individual whole. Such relief shall include reinstatement with the same seniority status such individual would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees.

18 U.S.C. § 1031(g) (Supp. I 1989).

In order to provide an incentive for whistleblowing activity, Congress amended the MFA in 1989 to create an award of up to $250,000 for "persons who furnish information relating to a possible prosecution under this section [of the MFA]." *Id.* Thus, not only does the MFA provide protection for employees who assist in the prosecution of unlawful acts by an employer, but it also provides an economic incentive for them to report these violations.

C. Department of Defense Authorization Act of 1987, 10 U.S.C. § 2409

In addition to the provisions provided under the False Claims Act and Major Fraud Act, the Department of Defense Authorization Act of 1987 extended whistleblower protection to individuals who disclose information to a Member of Congress or an authorized official of the Department of Defense or Department of Justice. This protection applies not only to instances of actual fraud in a claim, but also to any illegal action taken in relation to a contract (such as bribery or false misrepresentation). In particular, the Act provides:

> (a) Prohibition of Reprisals. -- An employee of a defense contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress or an authorized official of the Department of Defense or the Department of Justice information relating to a substantial violation of law related to a defense contract (including the competition for or negotiation of a defense contract).
>
> (b) Investigation of Complaints. -- A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General of the Department of Defense. Unless the Inspector General determines that the complaint is frivolous, the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor concerned, and the Secretary of Defense.
>
> (c) Construction. -- Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) or to modify or derogate from a right or remedy otherwise available to the employee.

10 U.S.C. § 2409 (1988).

Unlike the FCA and MFA, the Department of Defense Authorization Act of 1987 does not include either a reinstatement or penalty provision. Instead, individuals who have been the subject of a retaliatory discharge may submit a complaint to the Inspector General of the Department of Defense. With the exception of frivolous claims, the Inspector General must investigate the complaint and report any findings to the individual concerned, the contractors, and the Secretary of Defense. No further action is required of the Secretary under this section.

III. WHISTLEBLOWER PROTECTION FOR PUBLIC HEALTH & SAFETY VIOLATIONS

In order to encourage employees to disclose violations of federal statutes pertaining to public health, safety, and the environment, Congress has consistently included whistleblower protection provisions in legislation such as the Clean Water Act, the Clean Air Act, the Atomic Energy Act and others. In contrast to the fraudulent claims statutes mentioned previously, the Secretary of Labor is given responsibility for enforcing these whistleblower protection provisions.

A. Toxic Substances Control Act, 15 U.S.C. § 2622 (Employee Protection)

Under section 2622 of the Toxic Substances Control Act ("TSCA"), employers are prohibited from "discharging" or "otherwise discriminat[ing] against any employee" for commencing a proceeding under TSCA, testifying in a TSCA proceeding, or assisting in any action under the Act. An individual who believes his employer has violated this whistleblower provision has thirty days to file a grievance with the Department of Labor. If the Secretary of Labor determines that a violation of the employee's rights has occurred, the Secretary shall order the employee to be reinstated (with back pav, compensatory damages, and where appropriate, exemplary damages) 15 U.S.C. § 2622(b)(2)(A) and (B) (1988).

If an employer fails to comply with the Secretary of Labor's order, the Secretary shall file a civil action in the appropriate federal district court. The district courts are given the power to order injunctive relief, as well as require compensatory and exemplary damages. *Id.* § 2622(d).

Under section 2622(e), the penalty for the discharge or discrimination against a whistleblowing employee "shall not apply with respect to any employee who, acting without direction from the employee's employer (or any agent of the employer), deliberately causes a violation of any requirement of this chapter [TSCA]." *Id.* § 2622(e).

B. Federal Water Pollution Control Act, 33 U.S.C. § 1367 (Employee Protection)

Similar to the TSCA, the Federal Water Pollution Control Act (also known as the Clean Water Act ("CWA")), prohibits employees from being discharged or discriminated against for reporting or assisting in the prosecution of employers who violate the Act. One difference between the two Acts is that the CWA specifically provides that the Department of Labor shall conduct a public hearing so that each side may present evidence about the potential violation.

If an employer is found to have violated the whistleblower provision, it shall be liable for "a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees), as determined by the Secretary of Labor, to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings." 33 U.S.C. § 1367(c) (1988).

C. Safe Drinking Water Act, 42 U.S.C. § 300j-9(h) (General Provisions)

Under the whistleblower provisions of the Safe Drinking Water Act ("SDWA"), employees who are discharged or discriminated against for commencing, or assisting in an action under the SDWA, can bring a complaint with the Secretary of Labor. If the Secretary determines that such a violation of the employee's rights has occurred, then the Secretary shall order the employee's reinstatement (with back pay), compensatory damages, exemplary damages (where appropriate) and all reasonable costs (including attorney's fees) incurred in bringing the complaint. 42 U.S.C. § 300j-9(i)(2)(B)(ii) (1988).

Unlike TSCA and CWA, SDWA provides that employers who wish to challenge the Secretary of Labor's decision can appeal to the appropriate United States Court of Appeals. *Id.* § 300j-9(i)(3)(A). Such an appeal will not, unless ordered by the court, stay the order of the Secretary.

D. Resource Conservation and Recovery Act, 42 U.S.C. § 6971 (Employee Protection)

The employee protection provisions of the Resource Conservation and Recovery Act ("RCRA") provide whistleblower protection similar to the environmental statutes outlined above, including a provision for public hearings. Under the remedy section of this Act, if the Secretary of Labor determines that an employee has been discharged or discriminated against for assisting in an action against the employer under RCRA, then the Secretary shall require "the rehiring or reinstatement of the employee or representative of employees to his former position with compensation." 42 U.S.C. § 6971(b) (1988). While this section does provide for the reimbursement of attorney's fees, it does not specify whether the "compensation" to the employee includes both compensatory and exemplary damages.

E. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9610 (Employee Protection)

Similar to the SDWA, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") requires the Department of Labor to review charges that an employee has been dismissed or discriminated against because of his or her involvement in an action under the Act. 42 U.S.C. § 9610(b) (1988). Further, this section of CERCLA provides for both a public hearing prior to the Secretary of Labor's decision as well as an opportunity for either side to appeal the decision. *Id.*

If the Secretary of Labor determines that a retaliatory action has taken place, then the Secretary shall require "the rehiring or reinstatement of the employee or representative of employees to his former position with compensation." *Id.* Similar to RCRA, section 9610 does provide for the reimbursement of attorney's fees, but it does not define whether allowable employee "compensation" includes both compensatory and exemplary damages. *Id.*

F. Clean Air Act, 42 U.S.C. § 7622 (Employee Protection)

In conformity with the statutes mentioned previously, the Clean Air Act ("CAA") provides for the reinstatement of any employee who is discharged or discriminated against for participating in an action against an employer who violates the Act. Unlike the other Acts, the CAA not only allows both the employer and employee to appeal the Secretary of Labor's decision, but the Secretary as well as the employee may commence a civil action against the employer for failing to follow a reinstatement order. 42 U.S.C. § 7622(d), (e) (1988). Thus, the CAA appears to have the most explicit whistleblower provisions of the environmental statutes.

Under the penalty provisions of the CAA, employers are not only required to compensate the employee for back pay and legal fees, but the Secretary of Labor may also impose compensatory damages. *Id.* § 7622(b)(2)(B).

G. Surface Mining Control and Reclamation Act, 30 U.S.C. § 1293 (Employee Protection)

Unlike the statutes mentioned previously, the Secretary of Interior is responsible for enforcing the whistleblower provisions of the Surface Mining Control and Reclamation Act ("SMCRA"). Nonetheless, SMCRA is consistent with the other statutes in that it prohibits employers from discharging or discriminating against employees who have "filed, instituted, or caused to be filed or instituted any proceeding under this chapter." 30 U.S.C. § 1293(a) (1988). If the Secretary of Interior determines that a violation did occur, he may require the "rehiring or reinstatement of the employee or representative of employees to his former position with compensation." *Id.* § 1293(b). The employee can also receive all costs and expenses (including attorney's fees) which have been reasonably incurred in connection with the proceedings under this section. *Id.* § 1293(c).

H. Atomic Energy Control Act, 42 U.S.C. § 5851 (Employee Protection)

Under the Atomic Energy Control Act ("AECA"), no Commission licensee, applicant for a license, or contractor or subcontractor of a Commission licensee, may discharge or discriminate against any employee who is commencing, testifying or assisting in an action for violation of the Atomic Energy Act. 42 U.S.C. § 5851(a) (1988). Similar to the whistleblower provisions outlined previously, the Secretary of Labor is required to investigate any claims that the employee's rights have been violated. If the Secretary finds that a retaliatory action has occurred, then the employee must be reinstated with compensation (including back pay), litigation costs (including attorney's fees and expert witness fees), as well as compensatory damages to be determined by the Secretary. *Id.* § 5851(b)(2)(B).

The AECA also provides that either party may appeal the decision of the Secretary of Labor to the United States Court of Appeals for the circuit in which the underlying violation occurred. *Id.* § 5851(c).

IV. CALIFORNIA WHISTLEBLOWER PROVISIONS

Increasingly, many states are adopting whistleblower protection provisions to encourage and protect employees who assist in uncovering fraudulent claims against the government. A noteworthy leader in this area is California, which not only protects workers who uncover false claims against the government, but more generally, protects workers who uncover any violation of state or federal law. While the federal whistleblower provisions are generally adopted on a piecemeal basis, the California statutes provide a wider scope of employee protection than the federal whistleblower provisions.

A. California False Claims Actions Cal. Gov. Code § 12653 (West Supp. 1991)

Under the California False Claims Act, employees who report false claims are protected from a wide range of retaliation by their employers. Similar to the Federal False Claims Act, employers may not discharge, demote or otherwise discriminate against any employee who discloses false claims to a government or law enforcement agency, who files a *qui tam* action on behalf of the state, or who assists in an action under the California False Claims Act. Cal. Gov. Code § 12653(b). Any employer who discharges, demotes or otherwise discriminates against a whistleblowing employee can be held liable for the reinstatement of the worker, two times the back pay, interest on the back pay, compensation for "special damages," litigation costs (including attorney's fees) and where appropriate, punitive damages. *Id.* § 12653(c).

B. Employer Retaliation
Cal. Lab. Code § 1102.5 (West 1989)

Under the language contained within Cal. Lab. Code § 1102.5, employees who whistleblow against their employers for violations of state or federal laws are provided with a wide scope of protection. The provisions are as follows:

> (a) No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation.
>
> (b) No employer shall retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation.
>
> (c) This section shall not apply to rules, regulations, or policies which implement, or to actions by employers against employees who violate, the confidentiality of the lawyer-client privilege of Article 3 (commencing with Section 950), the physician-patient privilege of Article 6 (commencing with Section 990) of Chapter 4 of Division 8 of the Evidence Code, or trade secret information.

Unlike the California False Claims Act, an individual employer who violates section 1102.5 is guilty of a misdemeanor offense, and can be subject to a penalty of up to one year in prison and a fine of up to $1,000, or in the case of a corporation, a fine of up to $5,000. *Id*. § 1103. Section 1105 of the Act states that "[n]othing in this chapter shall prevent the injured employee from recovering damages from his employer for injury suffered through a violation of this chapter." *Id*. § 1005. Thus, employees who are terminated as a result of their whistleblowing activities can bring an action for reinstatement and back pay, as well as compensatory damages.

C. Employer Retaliation -- Health And Safety Issues
Cal. Lab. Code § 6310 (West Supp. 1991)

Employers who discharge or discriminate against employees who complain about unsafe or unhealthy working conditions or practices can be sued under Cal. Lab. Code § 6310.

If proven, the employee can receive reinstatement and reimbursement for lost wages and benefits. Any employer who willfully refuses to rehire, promote or otherwise restore an employee is guilty of a misdemeanor. The statute states the following:

> (a) No person shall discharge or in any manner discriminate against any employee because the employee has done any of the following:
>
> > (1) Made any oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, his or her employer, or his or her representative.
> >
> > (2) Instituted or caused to be instituted any proceeding under or relating to his or her rights or has testified or is about to testify in the proceeding or because of the exercise by the employee on behalf of himself, herself, or others of any rights afforded him or her.
> >
> > (3) Participated in an occupational health and safety committee established pursuant to Section 6401.7.
>
> (b) Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because the employee has made a bona fide oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, his or her employer, or his or her representative, of unsafe working conditions, or work practices, in his or her employment or place of employment, or has participated in an employer-employee occupational health and safety committee, shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer. Any employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by law, is guilty of a misdemeanor.

V. ILLUSTRATIVE CASES

While whistleblower statutes have been in existence for a number of years, it has been only recently that plaintiffs have begun to pursue aggressively this type of remedy. The following five cases are intended to demonstrate how courts have been applying this increasingly popular form of employee protection.

A. *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988)

In this case, an employee had claimed that he had been improperly discharged by his employer after he had reported that his supervisor was under investigation by the Federal Bureau of Investigation. In rejecting the employee's claim that he was discharged in violation of public policy, the California Supreme Court held that where an employee's disclosure only serves the private interest of the employer, there is no public policy which prohibits an employer from discharging an employee for providing that information. 254 Cal. Rptr. at 218.

While the Court stated that previous decisions have provided protection for employees who refuse to commit a crime, who report criminal activity, or who disclose other illegal, unethical or unsafe practices, no equivalent public interest was present in this case. *Id.*

B. *Collier v. Superior Court*, 228 Cal. App. 3d 1117, 279 Cal. Rptr. 453 (1991)

In this case, a California appellate court held that employees who are terminated in retaliation for reporting the suspected illegal activities of their fellow employees, which harm both the public as well as the employer, have a cause of action for wrongful discharge. 279 Cal. Rptr. at 453 (where co-worker pilferage of phonograph records harmed both the employer and the artists who were denied their royalties, a public policy concern justified the employee's tort claim). The Court distinguished this case from *Foley* stating that where the employee would have been protected by the whistleblower provisions of Cal. Lab. Code § 1102.5 if he had reported the illegal activity to an outside agency, it would be unfortunate not to allow the employee to have similar protection if he deals with the matter internally. 279 Cal. Rptr. at 456.

The Court further stated that retaliatory actions which prohibit employees "from informing anyone in the employer's organization about reasonably based suspicions of ongoing criminal conduct by coworkers" would be "a disservice not only to the employer's interests, but also to the interests of the public and would therefore present serious public policy concerns not present in *Foley*." *Id.* at 457 (footnote omitted).

C. *Verduzco v. General Dynamics*, 742 F. Supp. 559 (S.D. Cal. 1990)

In this case, an employee claimed that he was discharged for complaining to his supervisor that co-workers who lacked security clearances were given open access to restricted military documents. General Dynamics made a motion to dismiss the claim based on the fact that the employee had failed to notify a public agency of the violation. In rejecting General Dynamic's motion, the Court held that the public policy interest in protecting military secrets does not require that the information be provided to an outside agency. 742 F. Supp. at 562. Thus, even though the underlying statute only refers to the Secretary of Defense's power to limit access to the information, the fundamental national security interest would justify Verduzco's claim of retaliatory discharge in violation of public policy. *Id*.

D. *Shoemaker v. Myers*, 52 Cal. 3d 1, 801 P.2d 1054, 276 Cal. Rptr. 303 (1990)

In a case brought by a California Department of Health Services Inspector for wrongful termination under the California Whistleblower law, the California Supreme Court held that the whistleblower claim was not barred because the employee was also making a claim under the Worker's Compensation Act. 276 Cal. Rptr. at 316 (reversing a Court of Appeals decision that a whistleblower claim was precluded by the exclusive remedy provisions of the Worker's Compensation Act). In its decision, the Court stated that since the California Legislature had enacted a specific statutory provision protecting whistleblower activity, including a civil action for damages incurred from retaliatory acts, the protected activity is "a specific statutory exception to the [exclusive remedy] provisions of the workers' compensation law." *Id*.

E. *Macktal v. Secretary of Labor*, 923 F.2d 1150 (5th Cir. 1991)

In a recent case involving a nuclear plant worker who had been discharged for reporting safety violations, the Fifth Circuit Court of Appeals ruled on the issue of consent agreements under the whistleblower provisions of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1988) ("ERA"). In its decision, the Fifth Circuit held that the Secretary of Labor could not unilaterally modify consent agreements under the Act, but could only accept or reject them. 923 F.2d at 1154 (where the Secretary of Labor attempted to eliminate provisions of a consent agreement entered into by an employer and employee). The Court held that if the Secretary wants to "modify material terms of the negotiated settlement, she must obtain the consent of the other two parties to her proposed modifications." *Id*.

The appellant in *Macktal* also asserted that the consent agreement was invalid because he (the employee) had withdrawn his consent prior to the time that the Secretary of Labor's review was completed. In upholding the Secretary of Labor's ruling that the agreement was still valid, the Fifth Circuit held that once the employee has signed a consent agreement, he may not withdraw his consent until after the Secretary has completed her review. *Id*. at 1156.

VI. ILLUSTRATIVE VERDICTS

While the vast majority of whistleblower suits are settled or dismissed prior to trial, the following three cases illustrate the wide range of monetary damages which juries have awarded in these kinds of suits.

A. *Benecke v. Lockheed Corp.*, No. C621967 (Los Angeles County Super. Ct. Jan. 22, 1991)

Due to an irregularity in jury selection, the Los Angeles County Superior Court recently overturned a $45 million punitive damages award to three former Lockheed employees who claimed they had been fired as a result of their whistleblower activities. While Lockheed's motion for a new trial was granted on the issue of an unqualified juror, the judge refused to grant Lockheed's motion for a judgment notwithstanding the verdict.

In addition to providing for punitive damages, the jury had awarded $240,014 in compensatory damages, as well as $136,500 for emotional distress. In upholding the damages which had been awarded, the judge stated that the award was not disproportionate to the company's net worth or to the profits the company had earned on the C-5B airplanes the plaintiffs claimed were flawed.

B. *Coffey v. Hughes Aircraft Co.*, No. C632117 (Los Angeles County Super. Ct. Jan. 11, 1990)

In this case, a Los Angeles County Superior Court jury awarded $1.95 million to a former Hughes Aircraft employee who was fired after he had accused the company of overcharging the government on defense contracts. Prior to his dismissal, the plaintiff had accused Hughes of charging the government $48,000 for materials the company was able to obtain for $2,000, and on a secret project, charging $90,000 in employee time when the actual charges only totalled $35,000.

While the plaintiff had sought a total of $8.5 million in punitive damages and lost wages, the jury awarded him $127,477 in general damages, $75,000 for his pain and suffering, and $1.75 million in punitive damages.

C. *Parten v. Consolidated Freightways Corp.*, 923 F.2d 580 (8th Cir. 1991)

In January, the United States Court of Appeals for the Eighth Circuit affirmed a Minnesota jury's award of nearly $83,000 in compensation to a shop foreman who alleged that he was fired for refusing to falsify safety records. The plaintiff, who alleged that Continental Freightways pressured him to move trucks and trailers out of a maintenance shop at the expense of safety, claimed that he was fired when he refused to falsify maintenance records. The Court, in upholding a claim for wrongful discharge, stated that the Minnesota statute was not preempted by the federal whistleblower protection provided under the 1983 Surface Transportation Act.

VII. PREVENTIVE MEASURES

The dramatic increase in whistleblowing activity over the last few years has prompted many corporations to rethink their methods of dealing with employees who expose corporate fraud. While there is no model program which would apply in all circumstances, hundreds of corporations have established ombudsman programs which allow employees to report fraud internally. Although these programs cannot guarantee the elimination of employee whistleblower suits, such activities can decrease the likelihood that corporations will be subject to embarrassing worker disclosures.

Successful ombudsman programs, however, require companies to do more than simply establish a toll-free whistleblower hotline. Instead, companies must provide their employees with a concrete understanding of corporate ethics, and must demonstrate their commitment to eliminating fraud.

A. Educational Efforts

Recent examples of whistleblowing activity have demonstrated that much of this litigation can be avoided if companies provide their employees with a clear message about internal ethics policies. Even corporations which have adopted strong anti-fraud policies have been victims of whistleblowing activity because they have failed to teach their employees how to identify and report fraudulent conduct. Below are some of the steps which companies can take to inform their workers about anti-fraud efforts.

1. Establish a Code of Ethical Conduct -- Before it is possible to prevent unethical behavior, it is necessary for the company to identify what type of conduct is considered inappropriate.

2. Increase Worker Training -- Once a company has established a written ethics policy, employees should be provided with a copy of the policy, examples of what would be considered fraudulent conduct, and instructions on how to identify inappropriate behavior.

3. Provide Informational Tools -- After the employee training is completed, companies must continue to inform their employees about the importance of ethical conduct. Posters, flyers and newsletters can be used to demonstrate the company's continued commitment to identifying and eliminating fraudulent practices.

B. Reporting Mechanisms

The creation of ombudsman programs are an increasingly popular method of eliminating corporate fraud. While this program can consist of either a designated management officer or an external reporting agent, the intent of an ombudsman program is to provide a mechanism for employees to report internal fraud without a fear of retaliation. Although many corporations have been pleased with the results of these efforts, below are some of the issues which should be considered when establishing these programs.

1. Employee Confidentiality -- Before employees will be willing to report the fraudulent practices of their supervisors or fellow workers, they will have to be convinced that their disclosures will be met with willingness, confidentiality and non-retaliation.

2. Unlimited Access -- Some companies have found that these programs have become more than just a hotline for complaints of waste, fraud and abuse. While many calls will result from issues of supervisor conflicts, claims of discrimination, or complaints about promotions or transfers, such a level of contact increases the likelihood that the ombudsman will be contacted about instances of fraud and abuse.

3. Responsiveness -- The success of any ombudsman program goes beyond merely establishing a reporting mechanism. In order to ensure a successful program, companies must be willing to respond quickly and effectively to employee complaints.

MCKENNA & CUNEO

LABOR AND EMPLOYMENT LAW BULLETIN

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The articles that follow are reprinted with permission from various issues of the *Labor and Employment Law Bulletin*, published by the law firm, McKenna & Cuneo. They describe the more recent court decisions issued on the issue of Whistleblowers, thereby updating the preceding article, "Expanding Statutory Protection for Whistleblowers," which was presented as part of the 1991 Labor and Employment Symposium.

■ GOVERNMENT CONTRACTORS — SPECIAL ISSUES

Key Whistleblower Decisions Issued

Several important court decisions have been issued dealing with the rights of whistleblowers to sue companies for fraudulently charging the U.S. government on government contracts. These suits -- referred to as *qui tam* actions -- have become a major source of irritation to defense contractors who have been increasingly the target of this litigation brought by current and former employees. These rulings, taken as a whole, will likely result in even greater whistleblower litigation.

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■ GOVERNMENT CONTRACTORS — SPECIAL ISSUES

Key Whistleblower Decisions Issued

(continued from page 1)

A *qui tam* action is a lawsuit brought by a private person on behalf of the federal government alleging that the defendant contractor has defrauded the government. This litigation is permitted by the federal False Claims Act, a law originally passed in 1863 and later amended in 1986. That law was designed to encourage private citizens to uncover fraud committed by government contractors. Monetary incentives have been placed in the law to encourage such suits. This statute has been greatly criticized by the business community as nothing more than licensing corporate "bounty hunters." If successful, whistleblowers can receive up to 30 percent of the amount recovered by the government. The law contains a provision protecting whistleblowers from being "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against . . . because of lawful acts done by the employee on behalf of the employee or others in furtherance of [a *qui tam* action] . . . , including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed." Whistleblowers who prove such discrimination are entitled to "all relief necessary to make the employee whole," including reinstatement, double the amount of back pay plus interest, and attorneys' fees. 31 U.S.C. § 3730(h) (1988).

Private Fraud Actions Against Government Contractors Ruled Constitutional

The United States Court of Appeals for the Ninth Circuit has upheld the constitutionality of the whistleblower provisions of the False Claims Act. *United States ex rel. Kelly v. Boeing Co.*, No. 92-36660, 1993 U.S. App. LEXIS 22521 (9th Cir. Sept. 7, 1993). In this case, Kevin Kelly, an ex-employee of aerospace giant, Boeing, had sued his former employer, alleging that Boeing had defrauded the government in the performance of its work on the B-2 Bomber and Advanced Tactical Fighter contracts. After a three-year investigation of these claims, the U.S. government elected not to intervene in the litigation, and Kelly proceeded on his own.

Boeing challenged the case on several constitutional grounds. The Company argued that whistleblowers like Kelly lack standing to sue under the law since the only injuries that the statute recognizes are those to the government caused by fraudulent conduct. The Ninth Circuit disagreed, ruling that a *qui tam* plaintiff suffers injury since he or she is often left with the "Hobson's choice" of either remaining silent and being subject to potential liability, or reporting the fraud to a superior and suffering severe repercussions such as termination. According to the court, employees who discover fraud are "denied the benefit of working for an honest business" and this can cause mental anguish sufficient to satisfy the requirement that a plaintiff have an "injury in fact" in order to have standing to sue.

According to the Ninth Circuit, this statute does not unconstitutionally disrupt the balance of power between the branches of government even though it allows private citizens to bring claims on the government's behalf which is a power held by the Executive branch. The court concluded that the law gives the Executive branch sufficient control over *qui tam* litigation to preserve its constitutional role of enforcing the laws. The court likewise found that the *qui tam* provisions do not allow the Judicial branch to impermissibly interfere with Executive authority. The court compared the independent counsel provisions of the Ethics in Government Act previously upheld by the Court in *Morrison v. Olsen*, 487 U.S. 654 (1988), and found no overreaching by the False Claim Act provisions. The court further rejected the argument that by providing a bounty to a successful *qui tam* plaintiff, the statute violates the Due Process clause. The court decided that the *qui tam* plaintiff's financial interest in the outcome of the litigation does not create a conflict of interest with his duty as a government prosecutor to seek a fair and just result. The court noted that a *qui tam* plaintiff does not hold public office, does not enjoy the same powers as a prosecutor, and does not owe the same duty to serve the public interest. Indeed, the court observed that a *qui tam* plaintiff is essentially a private plaintiff, except that the government has the right to intervene. The court rejected Boeing's other Constitutional arguments as well.

While the United States Supreme Court has yet to be heard on this issue, the Ninth Circuit's ruling nevertheless sends a strong message to the legal and business communities that, at last for the time being, these lawsuits are hear to stay.

Illinois Court Expands Right of Whistleblowers to Sue For Discrimination

In a second decision helpful to *qui tam* plaintiffs, an Illinois federal district court recently ruled that the whistleblower protection provision of the False Claims Act provides employees with a discrimination claim even when they do not file *qui tam* actions under the Act. *Neal v. Honeywell Inc.*, No 93 C 1143, 1993 U.S. Dist. LEXIS 8284 (N.D. Ill. June 16, 1993). The court refused to follow an earlier decision by a federal court in California which had held that the Act affords protection only to those who actually file a *qui tam* suit.

In this case, Judith Neal reported to her supervisor that she had observed several instances in which employees falsified test records on ammunition to be supplied under a contract with the U.S. Army. The Company responded to Neal's report by notifying the government, conducting an internal investigation and voluntarily disclosing the results of the investigation to the government. A settlement agreement was reached in which the company paid the government $2.5 million, and the government waived its right to bring an action under the False Claims Act.

Neither the Company nor the government ever consulted with Neal after she had reported her observations to her supervisor. Instead, Neal alleged that she was discriminated against because of her disclosure, that she was cut-off from participation in the internal investigation, that her work responsibilities were changed, that physical threats were made against her by Company management, and that her coworkers expressed that they hated her. She also complained that the Company never informed her of her right to bring a *qui tam* action against the Company and thereby share in the sums paid to the government.

Neal's discrimination complaint was brought under the whistleblower protection provision of the False Claims Act. She did not include a cause of action alleging that the Company had defrauded the government, presumably because the underlying false testing allegation had already been resolved between the Company and the government. The court permitted Neal to maintain her discrimination suit despite the absence of an underlying false claim allegation. The court noted that even though the Act's legislative history speaks in terms of protecting those who report fraud "in conjunction with false claims prosecutions," public policy supports a broad application of the whistleblower protection provision.

The court's decision, unless overturned on appeal, could result in employees filing discrimination claims under the False Claims Act and thereby benefiting from the Act's broad protection and favorable remedies without ever disclosing the alleged fraud to the government and without incurring the burden of filing a *qui tam* action.

In the same case, the Company moved to strike that portion of Neal's complaint alleging that the Company violated some duty to inform her of her right to bring a *qui tam* action and share in the government's recovery. The court refused to strike that portion of Neal's complaint but did not make any determination as to the validity of her theory. The court did suggest, however, that if she could "demonstrate that she was deprived of her right to file a successful *qui tam* suit by the actions of the Defendants, the damage provision of [the False Claims Act] may provide an effective guide to the jury when awarding damages." The court further noted: "This potential raises the possibility that the government should be involved in this lawsuit [because] [i]f Neal is to receive a portion of the settlement, it is the government that has possession of those funds."

The court's suggestion that there may be some duty to inform internal whistleblowers of their right to bring a *qui tam* action against the company is troublesome. No such duty is set forth in the statute. Further, the possibility of obtaining a bounty after the government and the company have entered into a settlement and without the whistleblower ever filing a *qui tam* action would not seem to be in the government's interest and certainly would not enhance the government's enforcement efforts. Rather, such a result would appear to be inconsistent with the provision in the Act barring *qui tam* actions filed after the government has already initiated proceedings. Nothing in the Act or its legislative history envisions the scenario of employees waiting in the wings for their bounty without ever filing a *qui tam* action. We will keep you apprised as developments occur on this issue.

Ninth Circuit Allows Contractor to Counterclaim Against Whistleblower

To close on a positive development for government contractors, the Ninth Circuit has ruled that contractors are allowed to pursue counterclaims against whistleblowers when those whistleblowers cannot substantiate their charges of fraud. *United States ex rel. Madden v. General Dynamics Corp.*, No. 92-56042, 1993 WL 345381 (9th Cir. Sept. 14, 1993).

In the underlying case, several former and current General Dynamics ("GD") employees had filed a *qui tam* action in 1988, alleging that the Company had lied to the government about testing and development of the Phalanx missile system. GD denied the charges and counterclaimed against the plaintiffs for libel and stealing company trade secrets. The trial court had dismissed these counterclaims, ruling that if these charges were allowed to proceed, it would discourage whistleblowers from bringing these actions. The Ninth Circuit disagreed, holding that a government contractor is permitted to pursue such a countersuit. According to the court, by allowing these counterclaims, whistleblowers will hopefully be discouraged from asserting frivolous litigation. This ruling is consistent with an Ohio federal court's decision reported in the March 1993 Issue of the Bulletin. The practical result of this ruling will likely be to force potential *qui tam* plaintiffs and their lawyers to carefully evaluate the merits of their charges before deciding whether to pursue such a suit.

Using Settlement Agreements for Wrongful Termination and *Qui Tam* Claims -- Contractors Beware

The District Court for the Northern District of Illinois recently rendered a decision that serves as an important reminder that settlement agreements in wrongful termination cases involving government contractors must be drafted carefully if the defendant wishes to preclude the plaintiff from filing a *qui tam* action under the FCA.

In *United States ex rel. Robinson v. Northrop Corporation*, four individuals filed a *qui tam* action, alleging that Northrop made false statements to the government concerning credits owed to the government for excess inventory and false statements made about the progress of performance on various government contracts. One of the plaintiffs, Mr. Fredericks, had previously filed a discrimination suit with the Illinois Human Rights Commission and the Equal Employment Opportunity Commission. Fredericks' discrimination suit was settled for $10,000 in exchange for the signing of a document entitled "Settlement Agreement and General Release."

The Settlement Agreement contained standard language commonly used in wrongful termination cases:

> Fredericks does hereby forever release and discharge Northrop . . . from any and all liabilities, charges, complaints, claims, demands, causes of action or suits at law or equity of whatever kind or nature, known or unknown, which he or his personal representative may now or may hereafter have or assert against Northrop, based in whole or in part on any manner or thing occurring prior to this date, including, but not limited to claims Fredericks has asserted in the Complaint, which relate to Fredericks' employment termination from Northrop.
>
> Fredericks understands and agrees that the consideration recited above is in full settlement and satisfaction of all claims and demands whatsoever against Northrop as described [above], including any and all claims or demands for money damages, attorneys' fees and costs.

After the *qui tam* action was filed, Northrop moved for summary judgment against Fredericks on the grounds that he had previously released all claims, including claims against Northrop alleging violations of the FCA. On examination of the Settlement Agreement, the court found it to be ambiguous as to whether it included a release of claims under the FCA. The court found that the document was "vulnerable to two interpretations: one, that all claims were released, and the other, that only claims concerning Fredericks' employment termination from Northrop were released." The court held that it would be necessary to examine extrinsic evidence to explain the terms of the Settlement Agreement and the scope of the release, and therefore the court denied Northrop's motion for summary judgment.

Since many *qui tam* actions originate from employees who first bring discrimination and/or demonstrates how important it is for companies to look carefully at the terms of the settlement agreements that are used to resolve wrongful termination and discrimination disputes. Where an employee's conduct indicates an intent to file a *qui tam* action, it is advisable for the company to seek a release which *specifically precludes* the filing of a *qui tam* action. Even if an employee has not shown a predilection for being a *qui tam* plaintiff, companies that have become vulnerable to *qui tam* actions should nevertheless consider incorporating a *qui tam* release as a standard provision in their wrongful termination and discrimination settlement agreements. Care must be given to how these releases are written. Companies are well advised to seek the assistance of labor counsel in the drafting of these documents.

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■ WRONGFUL TERMINATION

Whistleblower Barred From Seeking Treble Damages under RICO for Alleged Retaliatory Discharge

In a significant victory for employers, the United States Court of Appeals for the Eighth Circuit recently ruled that a whistleblower is barred from suing a former employer for alleged retaliatory discharge under the Racketeer Influenced and Corrupt Organizations Act (RICO). *Bowman v. Western Auto Supply Company*.

RICO contains a civil enforcement scheme that permits private individuals harmed by criminal racketeering activity to recover *three times* their damages as well as all costs of suit, including reasonable attorney's fees; potential recovery under RICO is therefore much greater than under the normal wrongful discharge theories.

This case arose following Richard Bowman's termination by Western Auto Supply. Bowman contended that he was fired after discovering that the Company was "double billing" its merchandise suppliers by charging them for advertising and promotional services they never received. Bowman sought recovery for his termination under the civil provisions of RICO, claiming that the termination arose out of his former employer's racketeering activity and its alleged conspiracy to violate RICO.

The court, ruling on Western Auto's motion to dismiss, rejected Bowman's claim, concluding that any injuries sustained by Bowman as a result of being discharged from his job were not "by reason of" a RICO violation. In so concluding, the court expressed concern that a contrary holding would allow "[a] civil litigant, . . . to collect treble damages under the federal law (or to use the threat of those damages as bargaining leverage) rather than bringing a wrongful discharge claim in state court."

The Eighth Circuit's holding was consistent with the decisions of three other federal courts of appeals that have previously considered similar cases and concluded that injury sustained by an employee "blowing the whistle" on an employer's racketeering activity is not actionable under RICO. Two other courts of appeals have concluded differently, holding that while whistleblowers may not sue for substantive RICO violations, they may bring suit for "conspiracy to violate" RICO. The Eighth Circuit's decision in *Bowman* is significant therefore because it represents a further move away from a broad interpretation of RICO, which is an attractive vehicle for plaintiffs because of its potential for substantial recovery. Of course, traditional public policy wrongful discharge theories remain available in the right set of circumstances.

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■ GOVERNMENT CONTRACTS

Employers Face Two Unfavorable Whistleblower Decisions

Two federal appellate courts recently issued decisions that allowed plaintiffs to proceed with their actions against government contract employers.

In the first decision, employees of government contractors who report wrongdoing to their employer were held to be protected by the civil False Claims Act's anti-retaliation provision even if they do not file a whistleblower or *"qui tam"* action. In *Neal v. Honeywell Inc.*, 33 F.3d 860 (7th Cir. 1994), the Seventh Circuit was the first appellate court to reach this question which has divided several district courts.

A *qui tam* action is a lawsuit brought by a private person on behalf of the federal government alleging that the defendant defrauded the government. The whistleblower can receive up to 30% of the government's recovery. The Act, as amended in 1986, contains a provision protecting whistleblowers from retaliation.

Plaintiff Neal reported to her employer that her co-workers had falsified ammunition tests on an Army contract. The company conducted an internal investigation and voluntarily disclosed the matter to the government. The company agreed to pay the government approximately $2.5 million, and the government waived its right to bring a fraud action under the False Claims Act. Neal claimed that, as a result of her report, her responsibilities were diminished, and physical threats were made against her by management and her co-workers. Her complaint did not include a cause of action for submission of false claims, since the government and the company had already settled with respect to that allegation.

Honeywell asserted that Congress sought to protect whistleblowers who report fraud to the government in connection with a *qui tam* action. Honeywell argued that where a false claims "action" is not and cannot be brought (as in a case in which the allegations were settled before litigation was commenced), the plaintiff cannot bring a retaliatory discharge claim under the Act. Instead, the plaintiff would be left with whatever state law remedies are available.

The court held that a retaliation claim can stand alone, without the underlying false claims allegations, if at the time of the employee's disclosure, a false claims action could have been filed. The court noted that the limitation urged by Honeywell would enable companies that settle with the government to acquire the right to retaliate against the whistleblower. Consequently, the Seventh Circuit's decision opens the doors of the federal courthouse to an onslaught of such litigation that currently resides in the state courts.

In the second decision, government auditors were found not to be barred from bringing *qui tam* actions under the civil False Claims Act. *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 39 F.3d 957 (9th Cir. 1994). This decision may open the door to an influx of such litigation because, to date, the majority of *qui tam* actions have been filed by employees of the defendants.

Harold Fine, an employee of the Department of Energy's Inspector General's ("IG") Office, sued Chevron in one action and the University of California in another based on information he obtained while he was employed in the IG's Office. The United States District Court for the Northern District of California had held, in separate opinions, that Inspector General auditors were barred from bringing such suits.

The Ninth Circuit disagreed, noting that the Act does not explicitly exclude government employees from the class of persons who may bring *qui tam* actions. The Act bars *qui tam* actions that are "based upon the public disclosure of allegations or transactions" unless the plaintiff is "an original source of the information." An "original source" is someone who "has direct and independent knowledge of the information," and "has voluntarily provided the information to the Government."

Fine conceded that the information upon which he based his suits had been publicly disclosed, but argued that he was an "original source" of that information. The court agreed, noting that Fine learned of the alleged fraud by reviewing audit work papers and other financial records before the audit reports themselves were publicly disclosed. Thus, his information was direct and independent. The court also rejected Chevron's argument that Fine's disclosure was not "voluntary" because he had a duty as an IG auditor to disclose information regarding fraud to his superiors. The court noted that Congress was concerned about government employees who failed to report fraud and amended the statute to encourage them to speak up. Hence, the court found that it would be inappropriate to hold that the "voluntary" disclosure requirement bars government employees who have reported fraud to their superiors from filing *qui tam* actions.

Finally, the court found that Fine's direct role in the development and disclosure of the allegations distinguished him from a government employee who merely "republishes" government information that comes across his desk. In the latter situation, the court noted, the statute would bar a *qui tam* action.

These two decisions broaden the ability of whistleblowers to bring actions against a government contract employer under the False Claims Act. Government contractors may see an increase in such litigation if these decisions are embraced by other courts around the country.

Faculty Grievance Procedures Outside Collective Bargaining:

The Experience at AAU Campuses

MARTEN ESTEY

Grievance procedures for faculty members are now found at most major colleges and universities in the United States, those both with and without collective bargaining. Virtually all collective bargaining agreements have grievance procedures, covering large numbers of faculty. However, grievance procedures outside collective bargaining are now increasingly prevalent and available to an even greater number of faculty.

Faculty grievance procedures, both inside and outside collective bargaining, tend to be a relatively recent phenomenon. Although some faculty grievance procedures outside collective bargaining go back to the early 1960s, the majority of procedures examined for this report have been established within the past ten or fifteen years, and some as recently as the past two years.

Their development appears to be related to a number of factors, including the publication of the AAUP's 1968 *Recommended Institutional Regulations on Academic Freedom and Tenure*, which proposed a structure for a grievance procedure; Title IX of the 1972 Education Amendments to the 1964 Civil Rights Act, under which the federal government encouraged institutions of higher education to establish procedures for handling allegations of sex discrimination; the growth of collective bargaining in higher education and its stimulus to the development of grievance procedures generally; and, finally, the increasing bureaucratization of the university.

This study is focused on the fifty campuses affiliated with the Association of American Universities (AAU), which provide a diverse yet manageable sample. In some respects these campuses differ greatly. They are almost evenly divided between publicly supported (twenty-six) and private (twenty-four) institutions; they are widely distributed geographically; they range in size from the California Institute of Technology, with fewer than 350 faculty members, to New York University, with over 5,400; they include both church-related and nondenominational institutions. Yet they have other factors in common. Each is a major research institution; none is currently covered by a collective bargaining agreement; nearly all have faculty grievance procedures; standards originating at these major universities have often influenced the academic profession as a whole.

In undertaking this study, I have not attempted to depict a "typical" grievance procedure, spelled out step by step and provision by provision. To do so would be not only difficult but also impractical. Even if a "typical" grievance procedure could be produced, it would provide little guidance to the issues that have been faced and resolved in the process of its creation. Instead, I shall focus on the issues that tend to arise in the process of developing and administering a grievance procedure, and show some of the various ways in which these issues have been resolved. This way seems most likely to provide those involved in the grievance process with helpful comparisons to their own experience.

THE SCOPE OF THE GRIEVANCE PROCEDURE

A faculty grievance is an elusive thing, the description of which varies from campus to campus. The faculty and administration on each campus decide what constitutes a faculty grievance; they determine who may use the faculty grievance procedure, and what, when, and where they may grieve. A faculty grievance might be defined as a com-

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The views expressed here are those of the author alone unless otherwise indicated; they are not to be attributed to the AAUP, the AAU, or the Exxon Education Foundation. Persons interested in obtaining a copy of the study on which this essay is based may write to Jordan Kurland at the Washington office, AAUP.

". . .a 'complaint' does not always constitute a 'grievance.' "

plaint *by* an appropriate (eligible) person, *about* an appropriate issue, *at* an appropriate time, *to* an appropriate committee. A complaint that passes all these tests qualifies as a faculty grievance, but if it fails any of them it will not be a faculty grievance. It may be something equally important, but it will not be a faculty grievance, and it will not show up in data on faculty grievances.

In response to our first question, "who is eligible to use the faculty grievance procedure?" one is tempted to reply, "faculty members, who else?" But we are left with the question of which members of the college or university community are regarded as faculty, and the task of drawing the line between faculty members eligible to use the faculty grievance procedure and other employees who must use a different procedure.

Some universities with medical schools have two faculty grievance procedures, one for the medical school and one for the rest of the faculty. Thus, Harvard has one faculty grievance procedure for the Faculty of Arts and Sciences and another for the Medical School. Separate grievance procedures for their medical schools are also found at Brown, the University of Southern California, Stanford, and Wisconsin, among others.

The rationalization for separate grievance procedures for the medical schools appears to stem from their special needs and problems, as well as from such mundane reasons as the frequent location of medical schools physically "off campus." Perhaps foremost among their special circumstances are their extensive reliance on soft money, their widespread use of clinical appointments, and, last but not least, the medical school culture, still strongly influenced by the hierarchical structure of the medical profession, which, as someone has put it, is not "process oriented."

Another consequence of the size and complexity of the large research universities may be the establishment of separate grievance procedures for those in academic positions that do not carry faculty status. Thus, the University of Illinois at Champaign-Urbana has grievance procedures both for the faculty and for the academic professional staff. The faculty includes professors, associate professors, assistant professors and lecturers, and teaching and clinical associates—including adjunct clinical, visiting, and research ranks. Academic professionals are defined in the handbook as "those staff members designated as meeting specialized administrative, professional, or technical needs."

At Michigan, the faculty grievance procedure is available to "instructional staff members, both regular (professors, associate professors, assistant professors, instructors, and lecturers) and supplemental (all ranks of adjunct, clinical, and visiting instructional appointments)," while the grievance procedure for "primary research staff" applies to research investigators and assistant, associate, and (full) research scientists. And at Indiana, an aggrieved librarian turns not to the Faculty Review Board but to the All-University Librarians' Review Board.

Even on those campuses with a single grievance procedure for faculty and for other academics, the definition of faculty members eligible to use the faculty grievance procedure varies widely. Many grievance procedures make no attempt to define "faculty," presumably on the assumption that the term is clear and unambiguous, which it may well be at certain universities. But at many large universities, especially those with large research staffs, the meaning of the term "faculty" is hardly self-evident. The University of Maryland at College Park, for example, lists twenty-six titles for faculty members eligible to use the faculty grievance procedure. At Michigan State, the faculty grievance procedure is available to all full-time or part-time faculty, not only those of professorial rank, but also "lecturer, instructor, assistant instructor, research associate, specialist, or librarian." At Berkeley and UCLA, furthermore, not all faculty members have equal access to the faculty grievance procedure (the Privilege and Tenure Committee), which is normally limited to members of the Academic Senate. Those who are referred to as non-senate faculty (e.g., acting instructors, visiting professors, acting assistant professors, adjunct professors) generally have their grievances heard by the administration, rather than the Privilege and Tenure Committee. An interesting exception is described later.

Still another issue concerns part-time faculty. As their members grow, so does the importance of the question of their eligibility to use the faculty grievance procedures. Frequently, this issue is not addressed at all in the written statements on grievance procedures. Where it is specifically addressed, part-time faculty are often considered

"...the most common limitation is the insistence that the grievance procedure deal only with matters of improper or unfair procedures...."

eligible without restrictions, as at Michigan State and the University of Pennsylvania. At Maryland, on the other hand, access to the faculty grievance procedure is restricted to persons holding one of the twenty-six faculty titles listed in the grievance procedure, "in a 50 percent or greater time capacity."

In collective bargaining, a grievance may be defined as an allegation that the employer has violated the collective bargaining agreement; the collective bargaining agreement specifies, more or less succinctly, the rights of those who are covered by it, and, consequently, what is grievable. At institutions without collective bargaining agreements, such as the ones under consideration here, it is necessary to define what is grievable.

First, a terminological note. Although in some faculty handbooks "complaint" is used synonymously with "grievance," a complaint can cover broader ground—a "complaint" does not always constitute a "grievance." One may *complain* that no parking lot is close enough to his or her office to be convenient on a cold or rainy day, but regardless of how annoying that may be, unless it is discriminatory or unfair *per se*, it is probably not grievable. And, it should be added, even a grievable complaint is generally not considered a grievance unless it is submitted in writing (filed) and unless it is supported by *prima facie* evidence that it is a legitimate case. As any member of a grievance committee can attest, many inquiries and discussions about complaints do not result in the filing of a grievance.

So what constitutes the basis for a grievance? One may say that a grievance is a particular kind of complaint—*a complaint that a decision that adversely affects an individual in his or her professional or academic capacity has been reached unfairly or improperly*. A definition close to this is found at the University of Michigan, where a grievance is a charge that "a decision concerning any aspect of an eligible grievant's employment is manifestly unfair or illegal."

Grievable issues may be defined broadly or narrowly. Perhaps the broadest definition of what may be grieved is at the University of Illinois, where,

> Any faculty member may present a suggestion or grievance to any member of the Faculty Advisory Committee. The faculty member may request committee attention to any matter in the interest of the university, and, *specifically to any grievance*. (emphasis added).

At Catholic University the Faculty Grievance Committee may hear any petition by any member of the faculty "alleging any grievance whatsoever except dismissal."

Many institutions, however, define grievances more specifically. At Indiana University grievances are:

> complaints of faculty members regarding academic freedom, reappointment, tenure, promotion, salary adjustment and the nature and conditions of work.

And at Case-Western Reserve, a grievance is:

> an alleged action which adversely affects the complainant and is a violation of the Constitution of the University Faculty, the by-laws of the Faculty Senate, Constituent Faculty, or department; these policies and procedures (i.e., those set forth in the Handbook), or accepted norms of academic personnel practice.

Finally, a few institutions provide grievance procedures only for single issues—most notably, alleged discrimination. Thus Harvard, in 1978, established a grievance procedure for the Faculty of Arts and Sciences, for the "resolution of grievances which may arise alleging discrimination on the basis of race, color, religion, sex, or national origin."

Just as the faculty and administration can decide what *is* grievable, they may and do decide what issues may *not* be dealt with through the grievance procedure. Perhaps the most common limitation is the insistence that the grievance procedure deal only with matters of improper or unfair procedures, and not with substantive judgments, particularly those relating to professional competence. Thus, in grievances involving personnel actions—promotions, reappointments, and tenure—it is usually specified that the grievance committee or grievance officers cannot substitute their judgment for that of their fellow faculty members; they may only recommend a reassessment of that decision if they find that it was reached improperly.

The terminology varies, but the basic point is essentially the same from campus to campus. Thus, at Michigan, it is specified that "grievances...may challenge all aspects of the decision-

"...alleged discrimination cases are often assigned to a special committee or to the affirmative action officer".

making process *except those which involve conclusionary judgments about professional competence"* (emphasis added). At Berkeley, in grievances involving tenure, promotion, or reappointment, the Privilege and Tenure Committee may determine the validity of complaints that such decisions were made in violation of university rules, or on the basis of improper criteria, but

> ...it is not empowered to re-evaluate the academic qualifications or professional competence of the complainant.

The University of Pennsylvania specifies that the grievance panel may propose remedies (where it believes that decisions were reached improperly), but that "the panel shall not however have the responsibility or the authority to make a reevaluation of professional competence." This limitation on the use of the grievance procedure is in accordance with the AAUP *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments,* Recommendation 6 (Petition for Review Alleging Inadequate Consideration), which recommends that "the review committee should not substitute its judgment on the merits for that of the faculty body."

A second major constraint on the grievance process prohibits its use for challenging general university policy. Thus, the Stanford procedure specifies that:

> a grievance does not include dissatisfaction with a university policy of general application challenged on the ground that the policy is unfair or inadvisable.

Michigan's revised grievance procedure specifies that:

> these (grievance) procedures shall not be available for challenges to the desirability of unit or university policy.

And the University of Maryland's prohibits, among other things, grievances over

> broad areas of the fiscal management, staffing or structure of the University of Maryland or of the College Park campus; any matter pertaining to differences in faculty salaries and benefits that are based upon general market factors such as availability of faculty, demand for a particular academic discipline, or reputation of a department.

Such limitations on using the grievance procedure to challenge policy are not universal. An almost diametrically opposed approach is found at Berkeley and UCLA. There, non-senate faculty, who (as mentioned above) were not normally eligible to participate in the faculty grievance process, have generally been permitted, with the consent of the administration, to use the faculty grievance procedure when their grievance involved "broad educational issues" or issues of urgent interest to the Academic Senate. And, as we have noted above, the procedure at the University of Illinois, with a very broad definition of grievances, permits a faculty member to "request attention (of the grievance committee) *to any matter in the interest of the university"* (emphasis added).

A more specific limitation, which touches on an especially sensitive current issue, is found at the University of Washington. There, the Code and Regulations Committee concluded in 1983 that, after the president of the university has decided that a program is to be terminated, the merits and procedures involved in that decision "may not again be inquired into by the Grievance Committee. The Grievance Committee may consider only possible injustices resulting from the decision to terminate the program that may have been caused to particular petitioners."

In contrast, the procedure at the University of Nebraska provides that "if the grievance alleges that a discontinuance of a department or program is not *bona fide,* or that no extraordinary circumstances because of financial exigency exist, the committee shall investigate and state its factual findings, conclusions and recommendations in writing, which shall be filed with the chancellor...."

The question of when an issue is grievable becomes important in several circumstances. On the one hand are those cases in which a grievant alleges discrimination in the appointment process.[1] Thus, at Princeton, a person who has been *offered* a faculty appointment (whether or not it is accepted) is eligible to grieve if he or she believes the offer to have been discriminatory. Similarly, the University of Illinois procedure provides for "pre-employment complaints and grievances" on grounds of discrimination. On the other hand are grievances alleging improper termination of employment (as distinct from discharges), as a result of which a grievance may

"The requirement that an effort be made to resolve the grievance before it goes to a formal hearing is almost universal among the institutions surveyed."

Photo by Maryanne Sugarman.

Princeton University.

be filed by someone who is no longer a member of the faculty, as has happened at the University of Pennsylvania. Finally, many grievance procedures specify time limits for filing grievances. Though these limits vary widely among institutions, they commonly (and consistently with grievance procedures under collective bargaining) allow rejection of grievances that are not filed in timely fashion. The question of timeliness in filing grievances may, however, be complex. The University of Pennsylvania takes note of the problem in the following way:

> Since grievances may be cumulative and a faculty member may be uncertain whether he or she has been aggrieved until additional observations are taken, several years may sometimes expire before the faculty member is convinced or aware that cause exists to set the grievance machinery in motion. In consideration of this, a faculty member may base his or her grievance on prior as well as current events or conditions. Since problems of assembling and assessing evidence become more severe, however, as time passes, the grievance, where feasible, should be focussed on recent or continuing events or conditions.

Many institutions require that faculty members must exhaust other available remedies before filing a grievance. This generally means that grievants must first have gone through "administrative channels" with their grievance—which is to say that they must have appealed without avail to the maker of the decision being grieved (generally a chair or a dean) and then to that officer's superior (a dean, provost, or vice-president). If these appeals fail to produce success, *then* the faculty member may turn to the grievance process.

Where the grievance process is supplemented by or complemented by an ombudsman available to faculty, grievants may be required first to avail themselves of the services of the ombudsman—a logical extension of the prevailing preference for informal mediatory efforts as the first step in a grievance process.

The question of committee jurisdiction must also be resolved. Not all grievances are necessarily within the responsibility of the grievance committee. In practice, the assignment of a grievance to the proper committee depends on both the issue involved and the committee structure of the particular campus.

Grievances may be handled according to two sharply contrasting patterns of committee structure. In one, all major types of grievances are under the jurisdiction of a single faculty committee, so that the problem of determining which committee has jurisdiction over a grievance is largely eliminated. At Brown University, the single committee is the Faculty Policy Group, which is designated as the faculty's agent in resolving grievances involving academic freedom, failure to follow prescribed procedures in matters relating to reappointment or promotion, and discrimination based on race, sex, ethnic origin, religion, or age. The Faculty Policy Group, which has other assignments in addition to grievances, initially delegates grievance issues to its Grievance Mediation Subcommittee. Similar broadly inclusive approaches to the matter of jurisdiction over faculty grievances may be found at Berkeley and UCLA, where Senate Committees on Privilege and Tenure deal with grievance cases, including those involving tenure, promotion, and reappointment.

At the other extreme, we find the University of Illinois. There, although the Faculty Advisory Committee is empowered to receive "any grievance," and to deal with it if it is "within its

". . .at most institutions the majority of grievances are settled informally."

scope," grievances involving academic freedom, tenure, or dismissal for cause may go to the Committee on Academic Freedom and Tenure, and cases involving salary discrimination to the Faculty Salary Equity Review process, while still other procedures are available for handling complaints of discrimination and of sexual harassment. Here we have a multitude of grievance committees, each handling a specific type of grievance.

This degree of specialization permits each grievance committee to develop expertise in the particular type of problem it handles. But it may also involve delicate questions as to the proper assignment of a grievance. At the University of Pennsylvania, for example, the grievance procedure requires that:

> In the event it should appear to the chair of the (grievance) commission that the grievance raises a matter of academic freedom, he/she shall refer the notice of grievance to the Senate Committee on Academic Freedom and Responsibility, which shall promptly determine whether the grievance is in fact within the jurisdiction of the appropriate school committee on academic freedom and responsibility.

The complex relationship between different committees on a given campus can readily lead to jurisdictional disputes, if not jurisdictional confusion. At the University of Virginia, when questions of jurisdiction over particular grievances occur, they are resolved by the senate. Thus, the Senate Committee on Faculty Relations (the grievance committee) may refuse to mediate a dispute if it lies "within the jurisdiction of another committee of the senate or the university, the jurisdictional question to be determined by the senate."

In between these two poles is the common situation in which one or two kinds of grievances come under the jurisdiction of some committee other than the grievance committee. In particular, because of the need to comply with federal law, alleged discrimination cases are often assigned to a special committee or to the affirmative action officer.

At Duke, a Faculty Discrimination Grievance Committee deals only with issues of alleged employment discrimination, and at Harvard (as we have noted) the grievance procedure for the Faculty of Arts and Sciences officially applies only to grievances alleging discrimination on the basis of race, color, religious belief, sex, national or ethnic origin, handicap, and age.

Alleged violations of academic freedom, similarly, are often assigned to a committee on academic freedom and responsibility—and specifically removed from the consideration of the grievance committee. The grievance committee may be prohibited from infringing upon the jurisdictions of other longstanding committees and procedures. At Michigan State, for example, the grievance procedure is specifically not to pre-empt existing procedures dealing with anti-discrimination or with the activities of the Tenure Committee.

RESOLVING THE GRIEVANCE

After a grievance has been submitted, passed all the appropriate tests described above, and been accepted, the grievance committee customarily makes an effort to mediate the dispute.

The requirement that an effort be made to resolve the grievance before it goes to a formal hearing is almost universal among the institutions surveyed. The 1968 *Recommended Institutional Regulations on Academic Freedom and Tenure* stated that "the (grievance) committee may seek to bring about a settlement of the issue satisfactory to the parties. If in the opinion of the committee such a settlement is not possible or is not appropriate, the committee will report its findings and recommendations to the petitioner. . . ." Many grievance procedures define this step as "mediation." Others simply call for "informal" resolution of the dispute. At Brown, the function of the Grievance Mediation Subcommittee of the Faculty Policy Group is to "informally and confidentially. . .attempt a reconciliation of the differences between the parties to the dispute." At Catholic University, "It is the policy of the (Faculty Grievance) Committee to resolve all grievances in an informal, confidential and amicable way, and strive to avoid hearings and formal reports." Case-Western Reserve provides that the Committee on Faculty Personnel is available "for informal advice, investigation, and conciliation, on the informal request of the faculty member." Perhaps the most extensive use of mediation of faculty grievances is provided at the Massachusetts Institute of Technology, where the whole Institute complaint process is described as "mediation-oriented."

The use of mediation as one of the first steps in the grievance procedure is thus widespread. But mediation outside of collective bargaining may differ significantly from mediation under collective bargaining. In collective bargaining, mediation customarily refers to the use of "outside neutrals"

"The status of grievance committee recommendations is of central importance to the effectiveness of the procedure."

who have had no previous connection with either the employer or the employees. In the grievance procedures with which we are dealing here, the mediator is likely to be neither an outsider nor a true neutral, but, instead, a fellow faculty member (the grievance officer) or committee of faculty members (the grievance committee). In this respect, the grievance officer or committee perhaps more closely resembles the ombudsman than the traditional mediator of labor disputes. And, indeed, at a number of institutions, an ombudsman is available to assist in mediation of faculty grievances.

Nevertheless, grievance officers and grievance committees, in their mediative activities, do share two important characteristics with the traditional collective bargaining mediator. First, the essence of mediation is that the mediator works *between* the grievant and the defendant; the grievance committee is truly an *intermediary*, bringing into the process faculty members not previously involved in the dispute. Second, like the labor mediator, the grievance committee has no authority to impose a settlement on either the grievant or the defendant; mediation is an effort to achieve a voluntary resolution of the grievance.

The importance of mediation, or informal procedures, as compared to formal hearings, is underscored by the evidence that at most institutions the majority of grievances are settled informally. On campus after campus, we were told how seldom grievances go to a formal hearing. These observations are generally substantiated by the written reports of grievance committees. At Berkeley, we were told by a former chair of the Committee on Privilege and Tenure that the committee "goes for mediated settlements." And, in fact, in 1979-82 the committee handled thirty-four grievances, of which only one went to full formal hearings. At Brown, Provost Maurice Glicksman reported that although mediation is not used to resolve cases involving salaries or sex discrimination, all other faculty grievances from 1974 to 1984 were resolved by mediation. At MIT, with its emphasis on preventive mediation, formal grievances are extremely rare. At Michigan State, which has the most detailed and voluminous records that were available to us, the reports of the faculty grievance officer show that of 250 grievances settled between August 1972, when the office was established, and June 1983, some 180 were settled informally, as against 70 settled formally.

Should mediation fail to satisfy the grievant, he or she may request a formal hearing. Within higher education, standards for the conduct of formal hearings—whether they involve grievances, termination for financial exigency, or dismissal for cause—have been long established, particularly by the AAUP, and tend to be followed rather closely in grievance procedures.

These standards stress that a formal hearing is not a legal proceeding and that the legal rules of evidence do not apply. Nonetheless, the role of lawyers in the grievance procedure has received special attention. At UCLA, for example, I was told that it was necessary to "always have a law school faculty member on the Committee on Privilege and Tenure, or [it would] court disaster."

At the University of Oregon, a grievance that reaches the third step of the grievance procedure is submitted to the president of the university, who may either decide the case or assign it to a grievance hearing officer. The grievance hearing officer must be a member of the law or business school faculties, or someone with training in law or personnel negotiations. And, perhaps uniquely, in each case the president must decide in advance whether the grievance hearing officer is to "render recommendations or to be delegated authority to render a final decision." Thus, a member of the faculty rather than the administration may be authorized to resolve a grievance.

At the University of Pennsylvania, grievants may have a colleague to help in the presentation of their case, but the colleague may not serve as legal advocate in the presentation. This provision led to a dispute over whether a member of the law faculty could serve as a grievant's "colleague." Not surprisingly, the law faculty won the battle, emerging with the right to serve as colleagues but with the understanding that they would not act as advocates. The result is that most grievants now seek members of the law faculty as colleagues! Another distinctive feature of the University of Pennsylvania's grievance procedure is that the Grievance Commission has its own "independent legal officer" to assist the commission in its operations. The legal officer is not a faculty member but a lawyer employed by the senate (not the Grievance Commission); he or she assists the chair during grievance hearings and is authorized to obtain all relevant documentary evidence from the respondent. The author can testify that the legal officer is an invaluable addition to the grievance process.

". . .administrations are normally expected to concur in the recommendations of grievance committees."

The end product of formal hearings, of course, is the recommendation from the grievance committee for resolution of the grievance. The status of grievance committee recommendations is of central importance to the effectiveness of the procedure.

In sharp contrast to the wide variety found in most other provisions dealing with faculty grievances, we found almost complete unanimity on one important point: with the exception of the University of Oregon, in none of the AAU institutions are the recommendations of the grievance committees or grievance officers binding on the administration; they are only advisory. And in none is there provision for arbitration as the final step in the grievance procedure.

Some faculty members have expressed dissatisfaction and concern that, especially when a grievance involves a dispute between a faculty member and an administrator, the final judge of the grievance is not the faculty but the administration.[2] Still, administrations are normally expected to concur in the recommendations of grievance committees.

As the Stanford chapter of the AAUP noted in 1974, in connection with a proposed grievance procedure:

> Obviously refusal to follow or to be influenced by the recommendation of the Faculty Grievance Panel could not be carried to excess without destroying the harmony with the faculty that the university administration has sought and will no doubt continue to seek. At a university such as Stanford, there is every reason to believe that the recommendations of the faculty groups empowered to review faculty grievances will have substantial influence.[3]

A similar assumption underlines the wording of the grievance procedure at the University of Pennsylvania, stipulating that "the panel's report *is to be accorded great weight.*" (emphasis added).

In spite of these assumptions, the grievance process generates considerable tension between faculty and administration; a common problem in handling faculty grievances is the natural inclination of both administration and faculty participants to support their respective constituents and to regard their opponents as biased. Top administrators may tend to support the decisions of chairs and deans, and faculty representatives may favor their peers.

One high-level administrator acknowledged that "I am very supportive of my deans." At Berkeley, a former chair of the Privilege and Tenure Committee reported that the administration tends to support chairs, but he added that, if a chair were in the wrong, the administration would find it easier for a grievance committee to say so than to say so itself.

Administrators, for their part, fear that grievance committee members may be biased in favor of fellow faculty grievants and against chairs and deans. At the University of Washington, both faculty and administration spokesmen reported reluctance by the administration to accept grievance committee recommendations—in part because of administration belief of bias on the part of the grievance committee.

Given these perhaps unavoidable tensions, a crucial question is the extent to which administrations *do* follow the advice of grievance committees, especially when their recommendations support the grievant. Indeed, the question of administration response to grievance committee recommendations appeared to be the most critical issue at most of the campuses visited in the course of this survey. The nature of that response was considered to be at once the best indicator of the effectiveness of the grievance procedure and of the quality of faculty-administration relations. But just what sort of record should we expect from administrators in this situation? What standards do faculty grievance committees have in mind?

One criterion was provided by a former chair of the Privilege and Tenure Committee at Berkeley, who suggested that it would be a serious matter if grievance committee recommendations were rejected "more than 5 percent of the time." A former president of the AAUP chapter at the University of Southern California thought an appropriate yardstick would be how often the president of the university vetoed a unanimous recommendation of a grievance committee (something that had not happened at USC in thirty years).

But how does the record jibe with this high standard? At one end of the scale are institutions which, like USC, appear to meet it. At the University of Wisconsin-Madison, for example, members of both faculty and administration who were interviewed agreed with the assessment that the recommendations of the University Committee, which handles grievances as one of its numerous functions, are "almost never rejected by the administration," perhaps in part because the committee and the administration negotiate their differences until settlement.[4] Indeed, the vice chancellor for

"...the number of grievances actually filed is perhaps surprisingly small, even at large universities."

academic affairs went so far as to assert that "it is unlikely that any chancellor would refuse to accept a recommendation of the University Committee." At Northwestern, the associate provost reported that the administration "hardly ever turns down a unanimous recommendation of the faculty grievance committee," and would do so only if the process were flawed.

What might be called the middle ground on this issue was defined by the vice chancellor for faculty relations at UCLA, whose response to this question was, "Faculty governance at UCLA is central to the institution's well-being. When the senate speaks, the administration listens—but it is not a rubber stamp." (He cited two "celebrated rejections" of grievance recommendations to demonstrate his point.)

On the other hand, grievance committees may encounter serious problems in gaining administration acceptance of their recommendations.

At the University of Washington, the Grievance Committee reported to the senate that seven grievances were considered and completed in the academic year 1980-81. "Of seven completed cases, two received concurrence by the president, three were overturned by the president on one or more major points, and two were withdrawn by the grievant."

At Michigan, the experience of the Senate Advisory Review Committee (the final stage of the grievance mechanism between 1969 and 1981) seems to have been even more frustrating. In its 1978-79 annual report (when a previous administration was in office), SARC noted that:

> In eight of the twelve appeals since 1969, SARC had decided in favor of the grievant. It appeared that SARC's recommendations had not been implemented in any of these cases, although in some cases financial settlements had been offered.

SARC concluded that its recommendations "may be rejected by the administration respondents without accountability to the faculty, due to the strict confidentiality of the grievance appeal process."

What happens, then, when the faculty grievance process proves so ineffective? And what accounts for failures like those described above?

At Michigan, SARC's functions were brought to a complete standstill in 1981, when its unanimous recommendation to review an unfavorable tenure decision was rejected by the dean of the school involved, by the president, and, on appeal, by the board of regents. At that point, not surprisingly, there was a widespread conclusion that the grievance procedure was not working. Recognizing the need for a grievance procedure, the administration took the lead in the effort to design a new procedure. As the Task Force on Instructional Staff Grievance Procedures stated,

> Many feel that a major flaw in the review by SARC was that its advice came after several often long and involved proceedings in the school or college and after the position of the unit administrators had been reaffirmed. Our proposal moves faculty review to a much earlier stage of the process.

This new procedure went into effect in the fall of 1984—whether it lives up to expectations remains to be seen.

Effectiveness of grievance procedures may also be judged in terms of their cost in time and energy, the length of time they take, the extent of faculty awareness and use, and how often grievants "win" or "lose." Grievance procedures appear to be unavoidably costly in terms of time and effort. The time and energy consumed by all parties to the grievance procedure are illustrated by the 1982-83 report of the Privilege and Tenure Committee at UCLA:

> As the workload was heavy we met all summer. It is not merely meeting time—there is also the time involved in reading dossiers and running down information pertinent to the issues. Because the case load is heavy as well as complex, a good deal of frustration develops on the part of all concerned—committee members, grievants, and undoubtedly the administration. If the complex workload continues, some other kinds of structures or supports must be set forth and made available so that issues and cases can be dealt with in a manner we all think is effective.

At the University of Pennsylvania, my experience was that a grievance involving formal hearings seldom took less than an academic year to conclude, and some took longer. The need to speed up the process, without sacrificing quality, is widely recognized as essential to making the procedures more effective.

Yet, even as they struggle with the time-consuming work a grievance entails, grievance committees have expressed their concern that their procedures are not well known to the very group they are designed to serve, the faculty. The Senate Advisory Review Committee at Michigan, in its 1977-78 report, noted that:

"...no procedure is likely to be very effective when faculty-administration relationships are strained."

> ...the role of SARC (the Senate Advisory Review Committee)—even its existence—is not widely understood throughout the university. This may be unfortunate if it means that certain faculty members are unaware of the options that the committee's existence provides them in the appeal processes of the university.

As if to confirm this concern, the number of grievances actually filed is perhaps surprisingly small, even at large universities. Few of the institutions for which we have data report handling an average of as many as ten grievances a year. This may, of course, reflect faculty recognition of the high real costs of using the grievance procedure, rather than ignorance of its existence.

Finally, the best evidence we have on the odds that grievants will "win" their cases comes from the annual reports of the faculty grievance officer at Michigan State. Those reports show that, in the decade July 1, 1973, through June 30, 1983, thirty-eight cases were resolved in favor of the grievant, and thirty-four for the respondent. In an additional sixty-eight cases, the grievant was reported as "satisfied" (i.e., a compromise acceptable to both parties was reached). Another forty-nine were dropped. Incidentally, grievants fared much better in informal resolutions than in formal ones, winning eighteen of twenty-four informal settlements, as against twenty of forty-eight formal ones.

No single "key" to an effective grievance procedure may exist, though we may certainly observe that prompt resolution of grievances is highly desirable and that continued emphasis should be given to informal rather than formal settlements. While we might not go so far as to say that the quality of faculty-administration relationships alone determines the quality of a grievance procedure, we can certainly say that no procedure is likely to be very effective when faculty-administration relationships are strained. One measure of success for grievance procedures is whether the administration generally accepts the recommendations of the grievance committee, and this situation seems to prevail on campuses with long traditions of faculty involvement in governance, a tradition which often includes practices (such as rotation of faculty in and out of administrative positions) which discourage ingrained difference in administration-faculty outlook.

In the last analysis, the "ethos" of an institution (as Bernard Cohen, vice chancellor for academic affairs at the University of Wisconsin-Madison expressed it) may be the single most important factor in determining the effectiveness of a faculty grievance procedure.

NOTES

1. This reflects the requirements of Title VII of the Civil Rights Act of 1964, as interpreted by the Equal Employment Opportunity Commission.
2. In the last analysis, even faculty recommendations on tenure are only advisory. As the 1966 *Joint Statement on Government of Colleges and Universities* notes in regard to determinations of faculty status, "The governing board and president should...concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail."
3. Stanford University, Campus Report, Vol. 6, No. 35, May 29, 1974, p. 11; as quoted in Matthew W. Finkin, "The Arbitration of Faculty Status Disputes in Higher Education," *Southwestern Law Journal* 30 (Spring, 1976): 393.
4. A former vice chancellor also noted that the University Committee is not a due process body; under its charge it "may use whatever means and procedures it considered most likely to be effective in dealing with the matter" (a great time-saver!).

An Introduction to Arbitration

by

John Farrell Fay

Arbitration is a trial alternative for dispute resolution. The congestion of trial court calendars is suffocating justice nationwide. Legal authorities everywhere are turning to alternative dispute resolution as the savior of the courts. Overworked judges and too few courtrooms have forced many jurisdictions to legislate court annexed arbitration programs. Many states have enacted mandatory arbitration programs for certain types of claims. California, a leading jurisdiction, has had mandatory judicial arbitration since 1976. The program has removed several hundred thousand cases permanently from their courts' calendars.

Other state courts, choking on their caseloads, are enacting similar arbitration programs. Currently, Utah legislators are considering a court annexed arbitration program. The relief afforded the court system through an arbitration program is two-fold, direct and indirect. Each lawsuit resolved through arbitration is taken out of the court system, which brings a modicum of relief to that court's calendar. That is direct relief. Further, because the presentation or defense of an arbitrated claim is more relaxed, the parties are less likely to be filing motions with the court before the arbitration. Since the court has less involvement with the case before the arbitration, this abbreviated involvement indirectly brings its own relief.

Beyond the judicial arbitration programs are other independent arbitration programs throughout the country. Two age-old independent programs are the American Arbitration Association's program and the arbitrations associated with uninsured motorist claims. Nationwide, these forums resolve tens of thousands of claims each year. More recently rent-a-judge or private arbitration programs have sprung up in all major U.S. cities. Informed, interested parties see the problems with the court system and the advantages of arbitration. Clients, insurers and attorneys on both sides of a claim are agreeing to arbitrate claims to take advantage of its even-handed benefits.

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WHAT IS ARBITRATION?

Arbitration is a forum where smaller claims can be expeditiously resolved. It is similar to a bench trial in that an arbitrator or hearing officer is appointed to hear and decide the claim. It is less formal than a trial, thus consuming less time. Because it is less formal and faster, it is cheaper than the most cost effective trial.

IS ARBITRATION ADVANTAGEOUS FOR PLAINTIFFS AND DEFENDANTS?

Arbitration is advantageous for both the plaintiff and the defense. The advantages of the system benefit both sides equally. Likewise, any shortcomings affect both sides equally. Civil courts throughout the nation are congested with hundreds of thousands of smaller personal injury lawsuits. In the absence of a judicial arbitration program, the trial court's calendar congestion may force personal injury victims to wait years for resolution of their claims. The interest of justice demands that smaller civil claims be resolved in a quick, equitable, and cost efficient manner. Arbitration can be a quick means to an equitable resolution of smaller claims. The hearing is far more informal than a court trial, making for expressed justice. It is informal in that some evidentiary rules are relaxed (e.g., foundation requirements) and witnesses can testify, in absentia, through depositions, reports, declarations and affidavits. Evidence can be presented through medical, economic and police reports, repair invoices and wage verifications without the high cost associated with live testimony. Likewise, because there is no jury to contaminate, objections and motions are argued overtly without bench conferences. Additionally, absent a jury there is no time consuming voir dire, lengthy jury instructing, nor danger attendant to the jury misunderstanding pivotal instructions.

Equally important, these time savers save money. Arbitration incurs no jury fees, has limited subpoena and service fees, and expert witness fees are incurred only by choice.

While arbitration is not perfect for all cases, it generally does reflect adequate, if not substantial, justice. In a typical year in California some 40% of arbitration awards are appealed by a request for trial de novo, but only about 5% reach the trial court before settlement. Undeniably, most awards are fair. Most awards that initially are seen as unfair are at least palatable upon further reflection. If an arbitration award is considered less than that expected through a jury, generally the time and cost savings will off set such a difference.

Besides the attraction of an informal, speedy, low cost, and fair resolution, arbitration offers several other appealing features. For the client, it can eliminate or greatly reduce the client's frustrations associated with lengthy delays attendant to the "regular processing" of most lawsuits. The timid or nervous client, petrified of the whole courtroom mystique, will relish the informality and brevity of arbitration. Moreover, counsel should find the relaxation of evidentiary standards and the opportunity to present testimony by way of deposition, report, declaration or affidavit attractive.

THE STEPS TO GET YOUR CASE INTO ARBITRATION

The avenue to arbitration depends upon the type of claim you have. **Is your claim a filed lawsuit, an uninsured motorist claim or a claim yet to ripen into a lawsuit?** With a pending lawsuit in a jurisdiction having a judicial arbitration program, just follow the program's guidelines. Typically, three options are offered: 1) plaintiff's election, 2) court order, and 3) parties stipulation.

Plaintiff election means exactly what it says. The plaintiff "elects" to arbitrate his claim through the filing and service of an appropriate pleading. Usually, a plaintiff's election cannot be barred by the defense. All the defense can do is plead for a delay in the scheduling of the arbitration hearing, e.g., requesting more time to conduct necessary discovery.

A court ordered arbitration occurs when the court notifies the parties of the "arbitration determination conference." Judicial arbitration programs provide for an in-court appearance at which the trial judge determines which cases are amenable to arbitration under the program's guidelines. The most common factor used to order a case into arbitration is case value. Most programs have a monetary ceiling. To avoid arbitration the reasonable value of the case must exceed this ceiling. In California, all cases with a reasonable estimated value of $50,000 or less are subject to being ordered into arbitration.

At this arbitration determination conference, the judge asks both parties for their estimates of the case's value. The judge cross references these values against the special damages, the client's injuries and the client's prognosis to determine if the case exceeds or rests within the arbitration program's dollar limitation. Defenses that would be set-offs against any award, such as comparative negligence, do not enter into the court's determination of the case value.

"While arbitration is not perfect for all cases, it generally does reflect adequate, if not substantial, justice."

Obviously, when a party wants to avoid arbitration on a particular claim it will strenuously argue that the value of the claim clearly exceeds the monetary ceiling. Alternatively, a party might argue this claim is not a proper case for the arbitration program because it does not fit some other governing criteria. However, when the claim has a value in excess of the arbitration limit but the party is willing to forsake the excess for other considerations, inform the court there is no opposition to the court ordering arbitration.

The question may arise: **why would a plaintiff inconvenience himself with an arbitration determination conference in a case that clearly fits into the arbitration program when he could elect arbitration and avoid this inconvenience?** The answer lies in the rules of the jurisdiction's program or in case law interpretations of the program's rules. For instance, in California, when a case is "ordered" to arbitration, discovery closes at the cut-off date under the arbitration rules, except for expert witnesses, notwithstanding any later request for trial de novo. In contrast, if you "elect" arbitration, discovery is open post arbitration. The difference can be meaningful.

Stipulation is another way to reach arbitration. At some time before being ordered to an arbitration determination conference, either party can suggest stipulating to arbitrate the claim. The advantage of stipulating to arbitration is that both sides can agree to other provisions to govern the arbitration and its outcome, e.g., a minimum or maximum recovery regardless of the award amount or that an award is binding, i.e., no recourse to a trial de novo.

When the parties agree to the special and general damages or that all damages over a certain value will not be paid, e.g., the available insurance policy limits, leaving only the liability issue in contest, a stipulated arbitration may be the very best approach toward resolution. Claimant can save those costs associated with proving his damages. Likewise, since the defendant ultimately may be responsible for certain of these costs, it can save money as well. The stipulation can reflect that should liability favor the claimant, the damages will be the policy limits. Claimant can help force such an arrangement if the defense denies liability but admits to a policy limit injury by answer, interrogatory or admission. The arbitrator need not be appraised of the details of such an arrangement.

A related, yet risky type of stipulated arbitration is the "baseball" agreement. Here the parties can dispute liability or damages but agree to arbitrate the claim under provisions that are undisclosed to the arbitrator. The risks in "baseball" are in the restrictive all or nothing or high or low recovery approach. That is, the parties can agree that notwithstanding any arbitration award any recovery is limited by their agreement. Regardless of the size of the award, if the award is closer to the defense's floor of $10,000, than to claimant's ceiling of $100,000, the award will be the defense floor. The claimant forsakes the "excess" money of the actual award in exchange for the gamble of winning $100,000 through an award closer to his ceiling than it is to the defense floor.

If you have an uninsured motorist claim, arbitration is inevitable. No doubt arbitration is mandated; it is in the client's car insurance contract. The insurance contract will provide guidelines about how to proceed into arbitration. Usually, a written demand for arbitration to the insurer is sufficient. The insurance contract will detail other provisions of the arbitration procedure. To illustrate, it may provide for:

1) a triumvirate of arbitrators, one chosen by claimant, a second being the insurer's choice and the third chosen by agreement of the first two.
2) which jurisdiction's substantive or procedural rules will govern the arbitration, e.g., "this contract shall be construed and interpreted according to the laws of the Great State of Massachusetts" or "the arbitration will be conducted according to the rules and procedures of the American Arbitration Association."
3) how the costs of the arbitration are to be allocated, e.g., "each party to bear his own costs of arbitration except all parties are to bear equally the costs of the neutral (or third) arbitrator."
4) "a decision of two or more arbitrators is binding on the parties and can be entered as judgment in a court of competent jurisdiction."

In rarer circumstance, when a party has neither a lawsuit nor an uninsured motorist claim, but a claim yet to be formalized, arbitration remains an attractive remedy. While court order and plaintiff election arbitrations are not applicable, stipulation is available. To initiate the arbitration, approach the adverse party with a request to arbitrate. After a brief explanation, he or she might readily consent to arbitrate the controversy to avoid the hassles and costs attendant to lawsuits. Assuming a stipulation to arbitrate is executed, how do you get his bare claim into an arbitration forum? It is easy. A couple of casual phone inquiries, will tell you how to begin. You will find most arbitration programs invite such disputes into their program. Remember, reducing court congestion is the fundamental purpose of the arbitration programs. The program founders and administrators foresaw these rudimentary claims ripening into lawsuits if no remedy is available to them. This will further congest their courts. They drafted appropriate provisions within their programs to accommodate these claims. Programs like the American Arbitration Association also would welcome such a controversy to be submitted for resolution through its forum.

Any dispute involves little or no cost to them. They will provide an easy way to select a qualified arbitrator; the same way provided others for their "lawsuit" claims. Some judicial programs will pay the arbitrator's compensation while under other programs there is no such provision. Here the parties have to make appropriate arrangements with the arbitrator to pay his fees.

Five Sample Institutional Grievance Procedures

- Fort Hays State University
- University of Dayton
- University of New Mexico
- University of Miami
- Oakland University (Michigan)

Faculty Hearings and Appeals Procedures

In accordance with the principles of administration and due process and in order to ensure prompt determination of contested decisions and fair play to all concerned, the following options to disaffected faculty members (faculty defined as all individuals holding academic rank of instructor, assistant professor, associate professor, and professor) are available.[1] Any faculty member directly concerned and affected by a University decision related to academic freedom, condition of employment, termination of employment, termination related to financial exigency, program or unit discontinuance, sexual harassment, and other grievances shall have these recourse procedures:

1. There is an established tradition of informal appeal at FHSU and this informal procedure shall be maintained. The aggrieved faculty member has the right of an informal effort at mediation with his or her departmental chairperson; and if unsuccessful at this level, the faculty member has the right of an informal effort at mediation with the dean of his or her respective school.

   Since an open door policy has been maintained at all administrative levels, the aggrieved faculty member also has the right of informal appeal to the provost and to the president. This right shall not be infringed upon; however, in the event the employer/employee problem potentially falls under the rubric of Title VII (sexual harassment), then the grievant should consult the affirmative action officer. If the grievance is against the employee's immediate supervisor (department chairman, dean, vice president, etc.), then the grievant should process the grievance directly with the affirmative action officer who would then advise the grievant of the informal and formal procedures for handling the complaint. Should the informal procedures fail to satisfactorily resolve the grievance, the grievant, in consultation with the affirmative action officer, shall contact the Chairperson or any member of the University Affairs Committee to initiate the formal grievance procedure.

2. A request for a formal hearing based on an appeal in writing, initiated within sixty (60) days from the date of receiving written notification of the fact(s) constituting the grievance, will commence the proceedings. The written request will state the issue(s) and the reasons for appealing. It shall be dated and signed by the appealing faculty member and delivered to the appropriate department chairperson with a copy to the appropriate dean.[2] Not later than ten (10) working days from the receipt of the written request for such hearing, the department chairperson shall set a time, date, and place agreeable to both parties for a formal departmental hearing before a committee composed of at least three faculty from that department, notify the appealing faculty member, hereinafter referred to as "grievant," in writing of the time and place agreed upon, the names of the faculty comprising the departmental hearing committee, and the procedural rules of the committee.[2] A mechanical/electronic record of the departmental hearing will be made and a transcription will be made if it is so ordered by the chairperson of the departmental hearing committee.

   A decision in the form of a recommendation shall be made within seven (7) working days following the departmental hearing; and the decision containing findings of fact, conclusions, and a recommendation will be reduced to writing and delivered to all concerned parties with a copy to the department chairperson and the appropriate dean.[2] The dean within ten (10) working days will notify the grievant in writing of his or her decision. The grievant may accept the decision of the dean; and in that instance, the appeal procedure is completed.

   Under normal circumstances in a grievance procedure at the departmental level, legal counsel is not considered appropriate or necessary to such a proceeding. The purpose of this departmental hearing is fact-finding, to give the grievant an opportunity to present orally and by written documentation to the departmental hearing committee in a nonadversary atmosphere a total evidentiary statement, any new evidence, additional cumulative evidence, or interpretation of existing materials previously presented in support of the grievant's position so that the committee may consider corrective action by recommendation to the dean based upon all the facts.

A grievant who decides that support, advice, or counsel is needed during the departmental committee hearing, may have an attorney in fact (any personal advisor) or an attorney at law present to advise and counsel. Under the rules of the departmental hearing committee, the advisor's role and function is limited to advising the grievant. The advisor may not make any statement or argument to the hearing committee, but may communicate freely and completely with the grievant to advise him or her and have all necessary time to do so.

On rare occasion, if both the grievant and the department hearing committee agree that there are no issues, evidentiary matters, or evidentiary interpretations that have not been fully and completely explored by all parties, that no useful purpose would be served in illuminating the dispute, the grievant and departmental hearing committee may in writing notify the appropriate dean[2] and Chairperson of the University Affairs Committee of the Faculty Senate that both parties agree to waive the departmental hearing.

3. If the departmental hearing committee does not support the faculty member, or if it does support the faculty member and the dean[2] does not concur in the committee's decision and the grievant does not acquiesce in the decision of the dean,[2] he or she may commence within thirty (30) days an appeal to the University Affairs Committee of the Faculty Senate for a formal hearing and procedure before a University Appeals Committee.

   To institute the formal appeal at the University level, the grievant shall in writing notify the Chairperson or any member of the University Affairs Committee that he or she seeks a formal appeal. The notification shall state in writing the reason(s) for the appeal and the issue(s) to be determined by the University Appeals Committee. Upon receipt of such written notification, the Chairperson or any member of the University Affairs Committee will call a meeting of the University Affairs Committee which shall within ten (10) working days of the receipt of the notification select a panel of at least five (5) tenured faculty members and an appropriate number of alternatives to hear the University appeal and notify them in writing of their appointment to the University Appeals Committee.

   The University Appeals Committee shall within ten (10) working days of the written notification of their appointment meet and (1) select its own chairperson, (2) provide for its rules and procedures for due process, (3) set a date and place for the hearing which will be mutually agreeable to the parties, (4) notify all concerned parties in writing of the procedures to be followed and the time, date, and place of the hearing. A mechanical/electronic record of the University appeal will be made and a transcription will be made if it is ordered by the Chairperson of the University Appeals Committee.[3]

When the University Appeals Committee considers appeals of the nature of severe sanction or the dismissal of a tenured professor, it shall establish detailed and explicit procedural safeguards in substantial conformity with Section 5, "Dismissal Procedures," of the American Association of University Professors 1972, Recommended Institutional Regulations on Academic Freedom and Tenure (*AAUP Bulletin*, LVIII Winter, 1972), 428-433 and as outlined in Section B-4 of the April 18, 1947, Board of Regents Minutes.

The written decision of the University Appeals Committee in the form of findings of fact, conclusions, and recommendation(s) shall be transmitted to the president of the University with a copy to all concerned parties within ten (10) working days from the conclusion of the hearing.

4. Unless prevented from so doing by reasonable absence from the campus, the president of the University shall, not later than ten (10) working days from the receipt of the University Appeals Committee recommendation, notify the University Appeals Committee and all other concerned parties in writing of his concurrence with the University Appeals Committee recommendation. If the president does not concur with the University Appeals Committee recommendation, the president shall within a reasonable time submit a detailed statement in writing of the compelling reasons for the non-concurrence to the University Appeals Committee. The University Appeals Committee shall reply to the counter-arguments presented by the president within ten (10) working days and the president will then within five (5) working days make a final decision and notify all concerned parties including the University Appeals Committee of his final decision in writing.

5. In the event that the final decision is adverse to the interest of the affected faculty member, and if the appeal is of the nature of severe sanctions or dismissal, the grievant shall have the right to request a review of all documentary evidence and testimony.

6. In order to avail himself or herself of the formal grievance procedures set forth above, the grievant must, at the departmental hearing level, file his written statement initiating the proceedings with the departmental chairperson, with a copy to the appropriate dean,[2] within sixty (60) days from the date of receiving written notification of the fact(s) constituting the grievance.

In order to utilize the formal grievance procedure set forth above, a grievant must at the University appeal level, file a written statement initiating the proceedings with the Chairperson of the University Affairs Committee within thirty (30) days from the date he or she received the written decision from the appropriate dean.[2]

7. In sexual harassment cases, corrective action taken by the University, when a faculty member is judged to be at fault, shall depend upon the seriousness of the offense, along with past patterns of related activity. Sanctions shall range from informal oral agreements, written reprimand to dismissal in accord with the policies and procedures of the Board of Regents. A copy of the University Appeals Report and the president's decision will be placed in the offender's permanent master file. If the accused is exonerated, however, a chronology of the proceedings and copies of the report and president's decision will be maintained in the exonerated individual's permanent master file for no more than two years (see statute of limitations for filing complaints (180 days) specified by the Equal Employment Opportunity Commission (EEOC) under sexual harassment guidelines, Title VII of the Civil Rights Act of 1964). Access to the proceedings, report, and decision will be governed by University guidelines pertaining to permanent master files. At the end of two years, the exonerated individual will be permitted to remove the sexual harassment case documentation from his/her permanent master file.

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[1] See Chapter III for Procedures for Hearings and Appeals specifically related to tenure and promotion.

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[2] In the event that the department is unable to produce a three member departmental hearing committee or the grievant is a department chairperson, then the request for a formal departmental hearing will be filed with the dean and a copy delivered to the provost. The dean will then supplement those faculty members from the grievant's department willing and able to serve on a departmental hearing committee with members from other departments within the appropriate school to serve as a three-member formal hearing committee in lieu of a departmental hearing committee.

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[3] The grievant at his or her expense may elect to have a certified shorthand reporter present to make the record concurrence to the University Appeals Committee. The University Appeals Committee shall reply to the counter-arguments presented by the president within ten (10) working days, and the president will then within five (5) working days make a final decision and notify all concerned parties including the University Appeals Committee of his final decision in writing.

Approved by the Faculty Senate (05-06-81). Approved by President Gerald W. Tomanek (06-04-81).

*Reference Faculty Senate Bill No. SBO680 (05-06-81), revised by President Gerald W. Tomanek (06-04-81).

Revision approved by Faculty Senate (04-08-86). Revision approved by President Gerald W. Tomanek (04-21-86).

Revised Affirmative Action Policy. Originally approved by President Gerald W. Tomanek (February, 1987). Revised (November, 1989). Revision approved by President Edward H. Hammond (11-28-89). Revised and approved by Cabinet (06-30-93).

Non-tenured Appointment Hearings and Appeals Procedures

This procedure is developed in the recognition that difficulties between employers and employees will occasionally arise. Any non-tenure appointee shall have these recourses available when affected by University policy, action, or by an individual within the University. Resolving these matters quickly and as closely as possible to their occurrence is in the best interests of all concerned.

Since an open door policy has been maintained at all administrative levels, each employee has the right of informal appeal to his or her immediate superior and to the appropriate vice president; however, in the event that the employer/employee problem potentially falls under the rubric of Title VII (sexual harassment), then the grievant should also consult the affirmative action officer.

If the matter is not resolved to the employee's satisfaction through informal discussion, the employee may proceed to the formal grievance stage by presenting the grievance in writing to the immediate supervisor and/or the affirmative action officer describing concerns. In the event the grievance is against the employee's immediate supervisor, the grievance should be processed directly with the affirmative action officer. The grievance must be presented to the immediate supervisor and/or the affirmative action officer within 45 days of its occurrence. The supervisor or affirmative action officer will have 7 days in which to supply the employee with an answer in writing.

If the employee is not satisfied with the answer from the immediate supervisor, he or she may take the grievance to the appropriate vice president if that person is not the immediate supervisor. The grievance must be presented in writing within 5 days from the time the answer was given or due by the immediate supervisor. The vice president will have 7 days in which to provide the employee an answer in writing. In either situation, if the employee is not satisfied with the answer received from the vice president, he or she may take the grievance to the president. The grievance must be presented within 7 days from the time the answer was given or due by the vice president.

The president shall, within 7 days after receiving the grievance, appoint a committee of three persons to hear the grievance and shall set the date for the hearing. All concerned parties shall be notified in writing concerning the hearing, date, and location. Members of the advisory committee shall be employees of the University, and their selection shall be based on the objective of providing a fair and impartial hearing. The grievance committee shall consider such evidence as may be offered by the employee and supervisor.

A report of the findings of fact and recommended settlement of the grievance shall be forwarded by the grievance committee to the president within 7 days after the hearing. All parties involved in the matter shall be informed in writing within 5 days of the president's decision. A copy of the committee report and the president's decision shall be placed in the personnel file of the employee.

In sexual harassment cases, corrective action taken by the University, when a faculty member is judged to be at fault, shall depend upon the seriousness of the offense, along with past patterns of related activity. Sanctions shall range from informal oral agreements, written reprimand, to dismissal in accord with the policies and procedures of the Board of Regents. A copy of the committee report and the president's decision will be placed in the offender's permanent master file. If the accused is exonerated, however, the report and president's decision will be maintained in the exonerated individual's permanent master file for no more than 2 years (see statute of limitations for filing complaints (180 days) specified by the Equal Employment Opportunity Commission (EEOC) under sexual harassment guidelines, Title VII of the Civil Rights Act of 1964). Access to the report and decision will be governed by University guidelines pertaining to permanent master files. At the end of two years, the exonerated individual will be permitted to remove the sexual harassment case documentation from his/her permanent master file.

Approved by President Gerald W. Tomanek (08-06-81).

Revision approved by Faculty Senate (04-08-86). Revision approved by President Gerald W. Tomanek (04-21-86).

Revised Affirmative Action Policy. Originally approved by President Gerald W. Tomanek (February, 1987). Revised (November, 1989). Revision approved by President Edward H. Hammond (11-28-89). Revised and approved by Cabinet (06-30-93).

UNIVERSITY OF DAYTON

Employee Grievance Procedure

Policy

The University of Dayton is committed to enhancing the dignity of the individual, enforcing the rights and responsibilities of employees, and providing a safe and healthy workplace. A grievance procedure is available to employees to assist them in resolving difficulties or disagreements humanely, and as quickly as possible. Retaliation against anyone filing a grievance in good faith is a violation of University policy, as is the specious, bad faith filing of a grievance.

Definitions

The Employee Grievance Procedure is a mechanism of dispute resolution available to full- and part-time employees (including student employees) not covered by another University policy or agreement. Thus, the following classes of employees are excluded from this grievance policy:

1. Employees covered by a collective bargaining agreement.

2. Members of the faculty having a grievance about matters covered by the faculty grievance procedure as described in the Faculty Handbook section D.3 (especially point 14). Note, though, that a faculty member acting in an administrative capacity (e.g. department chairpersons) may be a party to a grievance brought by a person covered by this procedure (e.g. departmental secretary).

A grievable issue is one in which an employee has a complaint regarding wages, hours, or other terms and conditions of employment. Examples of areas in which grievance might arise include the recruitment and selection of employees, discipline, and discrimination. Sexual harassment is covered by this procedure only if it involves a supervisor/supervisee relationship.

Enforcement

Administrative officers are responsible for the enforcement of this policy within their jurisdictional areas. They shall make full- and part-time employees (including student employees) aware of this grievance procedure and they shall take appropriate action to correct improper conditions or to discipline offenders.

Grievance Procedure

Employees who have a complaint must first follow the informal procedure outlined below. If that procedure fails to provide satisfactory resolution the grievant must follow the formal procedure.

A. Informal Procedure

1. A grievant shall discuss the potential grievance with his or her immediate supervisor. If the problem is not satisfactorily resolved, the grievant must attempt to make the issue known to the next level supervisor(s) up to the divisional vice president. Before the divisional vice president makes a determination, he or she reviews the matter in question with the director of Human Resources. If the problem is unusually sensitive, and the grievant has concerns about discussing it with the line administrators, the grievant may instead seek consultation from the University. All initial contacts with supervisors or the University grievance officer will be kept confidential and no action of any sort will be taken without the explicit authorization of the grievant.

2. If the grievant wishes assistance to pursue informal resolution, the supervisor or University grievance officer will immediately attempt to resolve the grievance through a meeting with the appropriate person(s). If the grievant and the divisional vice president or the grievance officer agree that an informal meeting would not be effective or advisable under the circumstance, then the grievant must immediately initiate the formal procedure.

The current grievance officers are:

Dr. Margaret A. Emmelhainz
Associate Professor of Marketing
Room 312, St. Joseph's Hall

Kathleen D. Henderson
Assistant Director of the Office of
Minority Student Affairs
Room 101, O'Reilly Hall

Dr. Patrick Donnelly
Chair of Sociology and Anthropology
Room 429A, St. Joseph's Hall

B. Formal Procedure

1. The grievant who wishes to initiate formal procedures shall file with the grievance officer a written and signed grievance specifying the name(s) of the person(s) involved, the date(s) of the incident(s) in question, and the offending conduct. A grievance form may be obtained from the grievance officer. This formal complaint must be filed within thirty (30) days after the employee had or should have had knowledge of the facts which serve as the basis of the

grievance. The grievance officer may extend this 30-day period if an informal solution is in progress.

2. After receipt of a formal complaint, the grievance officer shall make determination of whether, based on the information supplied by the grievant, the matter in question is covered by this procedure. This determination is prepared in the form of a brief report and is completed as quickly as reasonable, usually within 15 days of the receipt of the formal complaint. The grievance officer's report can (1) certify that a resolution has been reached; (2) dismiss the complaint as without merit; or (3) schedule a formal hearing. The report will be sent to the grievant, the University employee against whom the grievance was brought, the director of Human Resources, the appropriate vice president and the senior vice president for Administration. A good faith effort shall be made to assure that this report is treated confidentially. The grievance officer does not attempt to determine the validity of the case presented by the grievant; she or he simply attempts to determine whether a grievable matter is in question.

3. If the grievance officer finds a grievable matter is in question and the grievance is still unresolved, the grievance shall be presented to a four-member Hearing Board. The composition of this Hearing Board will be the non-voting chairperson and three others, based on the classification of the parties as follows:

    a. If both parties are staff members, the Hearing Board will be the chairperson and three staff members.

    b. If one party is a staff or faculty member and one party is a student, the Hearing Board will be composed of the chairperson, one faculty member, one staff member, and one student.

    c. If one party is a faculty member and the other a staff member, the Hearing Board will be composed of the chairperson, one faculty member, one staff member, and a third person of a category mutually agreeable to both parties. If the category of the third member cannot be mutually agreed upon, it will be determined by the vice president for Administration.

4. If the grievance involves sex discrimination (including sexual harassment), the three members of the Hearing Board may not be of the same sex.

5. The properly configured Hearing Board shall be appointed by the senior vice president for Administration.

6. Members of the Hearing Board will be chosen from the members of a standing Grievance Board. A common orientation and training session will be held for new members of the Grievance Board. The term of a member appointed to the Grievance Board will be three years. Appointments are made by the senior vice president for Administration.

7. The formal hearing shall be held as soon as practicable, usually not more than thirty (30) days after the issuance of the report of the grievance officer. Both the grievant and the accused shall receive notice of the hearing date no less than five (5) working days in advance.

8. Each party may have an advisor from the University community present at the hearing. This advisor may participate in the hearing, subject to the reasonable limitations imposed by the chairperson of the Hearing Board.

9. In grievances which involve administrative policy (e.g. promotion, rate of pay), the Hearing Board ordinarily invites the director of Human Resources to the hearing to review his or her understanding of the application of University policy to the matter of the grievance.

10. Within ten (10) working days after the formal hearing, the Hearing Board chairperson shall submit a written report. The goal of the Hearing Board is to establish the facts of the matter in question, whether or not it believes University policy has been violated, and, if a violation has occurred, whether it is sufficiently serious that it believes some corrective action should be taken. While the senior vice president for Administration or president is responsible for taking any corrective action in the case itself, the Hearing Board is encouraged to report any suggestions for the clarification or development of University policy which it believes would be helpful, based on the circumstances of the case. Unless the parties to the grievance are members of units supervised by the senior vice president for Administration (excluding those supervised by the vice president and treasurer), the report of the Grievance Board is directed to the senior vice president for Administration. Otherwise, the report is directed to the president. Copies are sent to the grievant, the University employee against whom the grievance was brought, the grievance officer, the director of Human Resources and the appropriate vice president.

11. An audio taped record of the formal hearing will be made and maintained by the University grievance officer. A written transcript will be made only at the request of a party and at the party's expense.

12. A good faith effort shall be made to assure confidentiality regarding the parties and information provided. Hearing records shall be kept only by the grievance officer and shall be unavailable except for processing an appeal. Hearings will not be open to the public.

c. Minor Deviations

Minor deviations from these prescribed procedures shall not render a decision invalid unless it is found during the appeal procedure that the deviation caused substantial prejudice to one of the parties.

d. Outside Agencies

Personnel are required to seek internal resolution of grievances before going to a court or other agency off the campus. The grievance officer and Office of Human Resources will assist by explaining employee rights and grievance procedures.

Resolution, Sanctions, or Remedies

If the Hearing Board finds that a University policy has been violated in a manner sufficiently serious that it believes corrective action should be taken, this is reported to the senior vice president for Administration (or president) as described in B.10. When the matter is reported to the senior vice president for Administration, he or she confers with the vice president of the unit in which the grievance originated. if they agree on a course of action, it is taken as the resolution of the grievance. If they are unable to agree on a course of action, they present the matter to the president who makes a final determination. The administrative resolution determined is communicated to all parties to the grievance. (In the case that the Hearing Board's report was sent to the president, the formulation and communication of the administrative resolution is as above with the exception that it is made by the president after consultation by the senior vice president for Administration.)

The administrative resolution as provided for in the preceding paragraph may involve an adjustment of the terms of employment of the person who brought the grievance and/or the disciplining of any person found to have seriously violated University policy. Any disciplinary action will be taken in accordance with the University's policies and procedures. Depending on the severity of the offense, such sanctions or remedies may include a letter of reprimand, a formal warning, suspension, demotion, termination of employment, or dismissal as a student. In the case that a member of the faculty is to be disciplined for his or her role as a supervisor, the provost is consulted to determine whether the matter should be referred to another body as described in the Faculty Handbook.

Appeal

A. Dismissal of Complaint

A grievant who is not satisfied with the grievance officer's decision to dismiss their complaints shall appeal by writing to the senior vice president for Administration within ten (10) working days of the date on the notification letter. The senior vice president for Administration shall review the record and either confirm the decision of the grievance officer or order a formal hearing.

B. Formal Hearing

The findings of fact by the Hearing Board are final and not appealable. An appeal, claiming a prejudicial deviation from prescribed procedures, arbitrary and capricious behavior during the hearing, or a Hearing Board recommendation clearly unsupported by the record, must be submitted in writing to the senior vice president for Administration within ten (10) working days of receipt of the board's report. The senior vice president for Administration may uphold the board or order a new hearing before a new board. If either party is a member of the division of Administration, the appeal must be made to the president.

C. Sanctions or Remedies

Appeals of sanctions (with the exception of sanctions to faculty members acting in the capacity of administrators) or administrative remedies must be addressed to the president, whose decision is final. Faculty members may appeal sanctions to the Faculty Grievance Committee as described in the Faculty Handbook.

UNIVERSITY OF NEW MEXICO
DISPUTE RESOLUTION POLICY
Effective Date: November 1, 1994

1. General

The purpose of this policy is to provide a mechanism by which staff employees' on-the-job problems or complaints can be heard and addressed in a timely and constructive manner. Any work-related problem or issue can be raised under this policy, including conflicts or disputes between a staff employee and his or her supervisor or coworkers. The emphasis in these procedures is on early identification and resolution of disputes with fair consideration of both sides of a conflict. The procedures outlined in this policy are intended to be administered flexibly with the objective of resolving problems expeditiously at the lowest possible administrative level and with the cooperation of all concerned.

The procedures set forth in this policy are available to UNM staff employees, not including student employees. Allegations of unlawful discrimination or allegations of sexual harassment, whether brought by staff employees or faculty members, are handled under this policy. (Student complaints alleging possible sexual harassment or unlawful discrimination are handled in the office of the University's Equal Opportunity Programs [EOP] under its procedures.) Employees who are members of a collective bargaining unit should continue to use the grievance procedure specified in the appropriate collective bargaining agreement; however, if all the parties to the dispute agree, they may use the procedures set forth in this policy. Employees should be aware that assistance in handling problems in the workplace is also available at the University Counseling, Assistance and Referral Service (CARS).

Employees should also be aware that there may be federal or state laws and remedies pertaining to workplace complaints, and that participating in dispute resolution under this policy does not extend the deadlines within which to seek assistance from outside agencies or file legal proceedings.

This policy is intended to help employees with disputes involving issues which affect them personally in the workplace. Concerns by employees about possible violations of UNM policy or state or federal laws or regulations which are more general in nature (sometimes called "whistleblowing") are handled pursuant to **"Reporting Misconduct and Retaliation," Policy 2200, UBP.**

Retaliation against a UNM student or employee for raising an issue or participating in any way in dispute resolution under this policy is strictly forbidden and shall be subject to disciplinary action if found to have occurred.

This policy supersedes the previous version of **"Grievance Procedure" Policy 3220, UBP** and the Discrimination Complaint Procedure, approved by the President on April 29, 1993 (which also covered sexual harassment complaints).

2. Supervisor/Manager Responsibilities

It is a fundamental responsibility of supervisors at all levels to take appropriate, prompt, and fair action, commensurate with their authority, to resolve disputes in the workplace. Supervisors shall participate in training offered by the University on personnel management and dispute resolution. Supervisors should seek assistance in resolving disputes, as appropriate, from:

- their superiors (especially their chair, dean, or director);
- the Dispute Resolution (DR) Coordinator;
- the Counseling, Assistance, and Referral Service (CARS);
- the Labor Relations Manager in the Human Resources Department;
- the Equal Opportunity Programs office; or
- other University resources.

3. Labor Relations Manager

The staff within the Human Resources Department, especially the Labor Relations Manager, is responsible for helping employees and supervisors understand UNM Personnel Policies and resolve work related disputes. UNM Personnel Policies are published in **Section 3000** of the University Business Policies and Procedures Manual.

4. Equal Opportunity Programs

Equal Opportunity Programs, which reports to the President of the University, is responsible for helping employees and supervisors understand the University's Equal Opportunity/Affirmative Action Policies and Sexual Harassment Policy. Disputes involving work-related allegations of discrimination or sexual harassment that cannot be resolved in the workplace or with the aid of the second-level supervisor will normally be handled by the office of Equal Opportunity Programs in cooperation with the Dispute Resolution Coordinator.

5. Dispute Resolution Coordinator

The University has established the position of Dispute Resolution (DR) Coordinator which reports, on an interim basis, to the Vice President for Business and Finance. The DR Coordinator is responsible for helping to facilitate expeditious and fair resolution of work-place problems raised by UNM employees, including issues involving possible discrimination or sexual harassment. The DR Coordinator is responsible for coordinating efforts within various University offices to resolve such problems in a flexible and responsive manner. With notice to the parties, the DR Coordinator may vary the steps or procedures set forth in this policy in order to facilitate satisfactory resolution of a particular dispute. The DR Coordinator is not a judge and is not responsible for determining who is "right" or "wrong." Rather the DR Coordinator's role is to assist the parties in moving through an appropriate process to final resolution of the issues. Information obtained by the DR Coordinator in the course of facilitation, informal attempts at resolution, investigation, mediation, or other activities will be kept confidential and cannot be used in any subsequent steps in the process or in other legal proceedings.

The DR Coordinator will assist in dispute resolution training at all levels.

6. Disputes with Multiple Allegations

Only one (1) request for dispute resolution assistance or grievance may be maintained with respect to a given dispute. The DR Coordinator will work with the office of Equal Opportunity Programs and the Labor Relations Manager, as appropriate, to resolve disputes which involve allegations of possible discrimination or sexual harassment and/or possible violations of UNM Personnel Policies. Multiple disputes between the same parties which are related may be consolidated at the discretion of the DR Coordinator.

7. Dispute Resolution Procedure--Time Limits for Raising an Issue

Normally employees should contact either their supervisor, their second level supervisor, or the DR Coordinator within two (2) weeks of the occurrence of a problem concerning which the employee wishes to seek resolution under this policy. Problems involving possible discrimination or sexual harassment should be brought to the attention of the DR Coordinator within ninety (90) days of the most recent occurrence of the problem. Extensions of these time limits may be made by the DR Coordinator for good reason. Good reason may include reasonably founded concerns about possible retaliation. Decisions by the DR Coordinator to deny a request for a time extension for raising a workplace problem may be reviewed by the Vice President for Business and Finance (where the individual raising the issue is a staff employee) or the Provost (where the individual raising the issue is a faculty member).

8. Dispute Resolution Procedure--Step One: Efforts Within the Employee's Organization

Employees shall normally take problems or complaints to their immediate supervisor and seek a resolution of the problem. This step should take place as soon as reasonably possible after occurrence of the problem (normally within two [2] weeks). The employee and supervisor should meet and make a good faith effort to resolve the problem. In instances where the employee feels he or she cannot speak to his or her supervisor or second level supervisor about the particular matter, the employee may take the problem directly to the DR Coordinator. After discussing the matter with the employee, and otherwise becoming familiar with the situation, the DR Coordinator will decide what steps are appropriate to try to resolve the problem. The DR Coordinator may ask the employee to meet with the employee's second level supervisor or the dean or director of the employee's organization to give those individuals an opportunity to try to resolve the matter. Assistance may also be requested from the Labor Relations Manager or Equal Opportunity Programs (where allegations of discrimination or sexual harassment appear to be involved). Step One should normally be completed within three (3) weeks after the employee has raised the issue.

9. Step Two: Formal Dispute Resolution

If the employee is not satisfied after attempting to resolve the issue or problem informally, as described in Step One above (Section 8), the employee may make a request for formal dispute resolution with the DR Coordinator. This formal request should be made within six (6) weeks of the occurrence of the problem (or 90 days in the case of allegations of possible discrimination or sexual harassment). That date may be extended by the DR Coordinator if informal attempts at resolution are continuing, or for other good reasons. The request should include the following information:

- the nature of the problem or complaint;
- the communication that has taken place between the employee and his or her supervisor and/or second level supervisor concerning the matter;
- the supervisor's or other superior's response;
- the reason the employee disagrees with that response; and
- the employee's suggestion for proper resolution of the matter.

This information may be gathered by the DR Coordinator or designee in writing, in person, or by telephone.

9.1. Consideration by Dispute Resolution Coordinator

The DR Coordinator will discuss the problem with the parties, other appropriate individuals, and with the Labor Relations Manager/Equal Opportunity Programs office, as appropriate. The DR Coordinator will determine and implement an appropriate formal approach, usually mediation, to seek resolution of the dispute. Employees must participate in this process before they may pursue further steps in this policy, unless the DR Coordinator makes a written determination that the dispute is not appropriate for mediation, or that mediation is unlikely to be helpful in resolving the dispute. The DR Coordinator may conduct or arrange for further investigation of the matter either to facilitate mediation or to guide further decision making. Prior to mediation the DR Coordinator will furnish the parties with a written summary of the issues to be addressed and other pertinent information.

If the matter appears to involve allegations of discrimination or sexual harassment, the DR Coordinator may consult with Equal Opportunity Programs. That office and the DR Coordinator shall determine the proper approach. An investigation as provided in **Section 9.2** below may be conducted. If the matter involves a dispute over the proper interpretation of UNM personnel policy, a formal interpretation by the Director of Human Resources may be requested by the DR Coordinator, as provided in **Section 9.3**. below. Mediation or other efforts to resolve the dispute may be suggested by the DR Coordinator in his or her discretion before or after these referrals, and may take into account information or findings resulting from such referrals.

Every effort should be made to complete Step Two in two (2) to four (4) weeks. However, it is recognized that resolution of complex disputes may take longer, particularly if an investigation is necessary. If the matter is successfully resolved, the DR Coordinator should ensure that an appropriate agreement is written and signed by the parties.

9.2. Alleged Sexual Harassment or Discrimination: Investigation by Equal Opportunity Programs (During Step Two)

If the employee alleges that he or she was subject to discrimination or sexual harassment on any basis prohibited by UNM's Equal Opportunity/Affirmative Action Policy, and the employee is not satisfied with the outcome of any dispute resolution attempted as part of Step Two, or the DR Coordinator believes that immediate referral to EOP is appropriate, the employee shall be referred to the EOP Office and may file a charge of discrimination or sexual harassment. A charge should be filed within two (2) weeks of such referral. An investigation if deemed appropriate by Equal Opportunity Programs may be conducted, in which case a letter of determination will be furnished to the parties, the DR Coordinator, and to the dean or director of the parties' organization as soon as reasonably possible. The letter of determination shall state the recommendations of the Director of Equal Opportunity Programs.

If either party disagrees with the findings or recommendation or EOP, the matter may be appealed to the Provost (where the respondent is a staff employee) or the Vice President for Business and Finance (where the respondent is a faculty member) for final resolution (subject to discretionary appeal as provided in **Section 11**.)

9.3. Disagreements Concerning Interpretation of UNM Personnel Policies: Formal Interpretation by Director of Human Resources (during Step Two)

If the problem or issue raised by the employee involves a disagreement between the employee and management about the interpretation of UNM Personnel Policies, the DR Coordinator may request a review by the Director of Human Resources. The written decision of the Director of Human Resources on the issue may be appealed to the Vice President for Business and Finance in writing within two (2) weeks of its receipt.

9.4. Decision by Dean or Director of Employee's Organization (Conclusion of Step Two)

If the parties have not resolved the dispute through the processes identified in Step Two above, the DR Coordinator shall so certify to the dean or director in writing and request that the dean or director issue a written decision within three (3) weeks concerning the issues raised. The parties shall be given an opportunity to explain their positions orally and/or in writing. The dean or director's decision shall be consistent with any personnel policy interpretation or EOP investigative report received in the matter. This decision shall be final, except as provided in **Section 10** (Step Three--Peer Review Hearing/Arbitration, below) or unless there is discretionary review by the President or Regents as provided in **Section 11**.

10. Step Three: Peer Hearings or Arbitration in Cases Involving Demotion, Suspension without Pay, or Discharge

10.1. Peer Hearing

If a post-probationary employee is dissatisfied with the results of Step Two, and he or she has been demoted, suspended without pay, or discharged, the employee is entitled to request a peer hearing (as described herein), after all other steps of this dispute resolution procedure have been exhausted. The request should be made within two (2) weeks of the dean or director's decision at the conclusion of Step Two. If a peer hearing is requested, the DR Coordinator will arrange for the hearing as soon as reasonably possible. The hearing will be held before a Peer Review Committee. The decision of the Committee is final, unless a discretionary appeal is allowed by the President or the Board of Regents, as provided in this policy. Hearings shall be conducted in accordance with UNM Model Hearing Procedures. Hearings shall be recorded and shall be private.

Members of the Peer Review Committee will be selected from the Peer Hearing Pool which consists of UNM employees who serve for staggered periods of two (2) years. The pool members will receive thorough and regular training in the conduct of hearings and UNM Personnel Policies. The Peer Review Committee shall consist of three (3) uninvolved UNM employees who have no connection with the dispute, nor any prior relationship with the parties, nor any interest in the outcome of the hearing. The members of the committee will select one of their number to serve as chair. The Committee members will be randomly selected from the Peer Hearing Pool as follows:

- Names of four (4) individuals from the same "Primary Occupational Activity" in UNM's biennial EEO-6 Report as the complainant will be drawn. Each party shall strike one (1) name from the list. The remaining two (2) individuals will serve on the committee.

- Names of three (3) individuals from the same "Primary Occupational Activity" in UNM's biennial EEO-6 Report as the respondent will be drawn. Each party shall strike one (1) name from the list. The remaining individual will serve on the committee.

10.2. Arbitration

If a post-probationary employee is dissatisfied with the results of Step Two and he or she has been demoted, suspended without pay, or discharged and the parties agree, the dispute may be submitted for final and binding arbitration instead of a peer hearing. The Dispute Resolution Coordinator will assist in this process, including furnishing the names of possible arbitrators, and preparing an agreement to submit the dispute to binding arbitration.

11. Discretionary Review by President and Board of Regents

The President and the Board of Regents reserve the discretionary authority to review all decisions. The President and the Regents normally will accept review only in extraordinary cases, such as those where proper procedures have apparently not been followed, where the decision appears to be unsupported by the facts, or where the decision appears to violate University policy. Any appeal will be handled pursuant to the policies of the President and Regents concerning discretionary reviews.

12. Dispute Resolution Committee

There will be a Dispute Resolution Committee appointed by the President to evaluate periodically the effectiveness of this policy. The Committee shall consist of the Vice President for Business and Finance and four (4) other individuals appointed by the President for a two (2) year term as follows:

- one (1) faculty member appointed from at least three (3) names submitted by the President and the Faculty Operations Committee of the Faculty Senate;
- two (2) staff members appointed from at least five (5) names submitted by the President and the Executive Committee of the Staff Council; and
- one (1) chair, dean, or director.

The Committee shall receive statistical, descriptive, and evaluative reports from the DR Coordinator, and shall meet with him or her periodically. The Committee will also meet with the Labor Relations Manager, the Director of Equal Opportunity Programs, and other individuals deemed appropriate by the Committee. The Committee may make suggestions to the DR Coordinator concerning the administration of this policy and shall report annually on the effectiveness of this policy and its implementation to the President, the Faculty Senate, and the Staff Council.

13. Implementing Guidelines

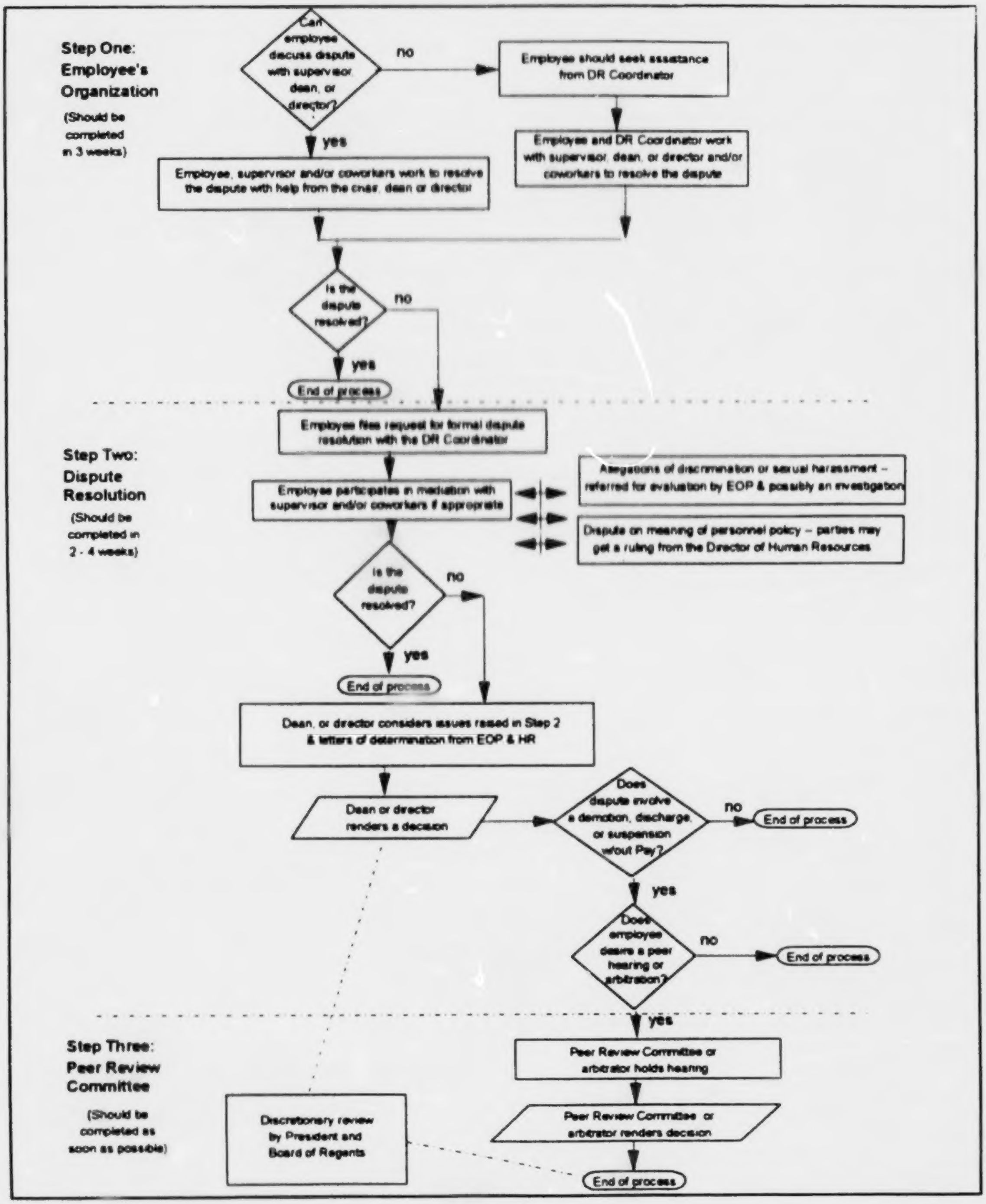
The Labor Relations Manager, the Director of the Equal Opportunity Programs, and the DR Coordinator shall each adopt more detailed guidelines for implementing this policy. These three (3) officers shall coordinate the preparation of such guidelines. Copies of the guidelines shall be available to parties to disputes and to the public.

14. Attachments

Exhibit A. - Flowchart of Dispute Resolution Process

Exhibit A.

Flowchart of Dispute Resolution Process


Step One:
Employee's
Organization
(Should be completed in 3 weeks)
Can employee discuss dispute with supervisor, dean, or director?
no
Employee should seek assistance from DR Coordinator
yes
Employee, supervisor and/or coworkers work to resolve the dispute with help from the chair, dean or director
Employee and DR Coordinator work with supervisor, dean, or director and/or coworkers to resolve the dispute
Is the dispute resolved?
no
yes
End of process
Step Two:
Dispute
Resolution
(Should be completed in 2 - 4 weeks)
Employee files request for formal dispute resolution with the DR Coordinator
Employee participates in mediation with supervisor and/or coworkers if appropriate
Allegations of discrimination or sexual harassment – referred for evaluation by EOP & possibly an investigation
Dispute on meaning of personnel policy – parties may get a ruling from the Director of Human Resources
Is the dispute resolved?
no
yes
End of process
Dean, or director considers issues raised in Step 2 & letters of determination from EOP & HR
Dean or director renders a decision
Does dispute involve a demotion, discharge, or suspension w/out Pay?
no
End of process
yes
Does employee desire a peer hearing or arbitration?
no
End of process
yes
Step Three:
Peer Review
Committee
(Should be completed as soon as possible)
Peer Review Committee or arbitrator holds hearing
Peer Review Committee or arbitrator renders decision
Discretionary review by President and Board of Regents
End of process

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UNIVERSITY OF MIAMI
PERSONNEL
POLICIES AND PROCEDURES MANUAL

Revised 02/94

GRIEVANCE PROCEDURE

PURPOSE: To provide a procedure for processing employment-related complaints of nonexempt employees.

DEFINITIONS: *Grievance*. A claim based upon a condition or act affecting the employment of a nonexempt employee when the employee believes such act or condition is inequitable or unfair.

Grievant. An employee having a grievance as defined above. Temporary and newly hired probationary employees are limited to Steps I and II of this procedure.

Working Days. Monday through Friday excluding University holidays and other authorized absences.

POLICY: The Human Resources Office is responsible for the management of all non-Affirmative Action grievances. Grievances based on race, color, religion, sex, age, national origin, disability, or veteran status are to be processed by the Affirmative Action Office. Grievances alleging sexual harassment are to be processed by the Affirmative Action Office in accordance with the policy on sexual harassment (see Sexual Harassment Policy, F-10).

This Grievance Procedure may not be used to challenge written University policies and procedures. However, if University policies, practices and procedures appear to have an adverse impact on employees (especially minorities and women), such policies, practices and procedures should be brought to the attention of the Human Resources Department.

Non-University employees shall not be involved with the grievance procedure except as witnesses if called by the panel (see Step III). The grievant may choose to be assisted at any step of the grievance procedure by a regular University employee who is not an attorney or a law professor; such person is considered an "employee representative" under this procedure. The grievant, any witnesses (if called by the panel), and the employee representative will not be subject to any financial or other reprisals or benefits as a result of participating in the grievance procedure.

At each step in the procedure, grievant and supervisors are urged to consult with the appropriate Human Resources Office for assistance in resolving the grievance. If the grievant wishes to pursue a formal grievance with the assistance of the Human Resources Office, the grievant is to provide a written statement of the allegation and the desired remedy. The Human Resources Office will assist as requested in Steps I and II of the procedure, and provide technical assistance to ensure compliance with University policy and applicable laws in connection with the grievance. The Human Resources Office staff will attempt to resolve the grievance as expeditiously and fairly as possible. Once a grievance is submitted in writing, grievants are asked to refrain from pursuing the grievance through any other channel until such time as the grievance procedure is concluded with respect to the grievance at hand.

A grievance can only represent the interests of a single grievant. A single grievant may not grieve other employees' interests under this procedure. The Associate Vice President for Human Resources/Affirmative Action or designee may also combine like grievances under Step III of the procedure.

Whenever possible, grievances should be resolved at Step I of the procedure through personal, informal discussion between the grievant and the grievant's supervisor. The grievant may withdraw the grievance at any point during the procedure, in which case the grievance will be considered resolved.

When a grievance is based on an act or condition imposed by the decision of a supervisor, that decision will remain in effect during the processing of the grievance under this procedure.

A grievant, supervisor, or a panel chairperson may ask for an extension of the time limits at any step in the grievance procedure by making a written request to the appropriate Human Resources Office. If the supervisor or the panel does not respond to the grievant within the prescribed time limits as extended by the Human Resources Office, the grievant may proceed to the next step of the procedure. If the grievant does not adhere to the prescribed time limits, the grievance will be considered settled in accordance with the last answer provided by the University. The Human Resources Office may extend the time period for valid reasons at either step of the process.

In instances where an employee files a grievance or affirmative action complaint with an outside agency or an attorney (see Equal Opportunity/Affirmative Action Policy, A-20), and the agency or attorney directly contacts any department within the University other than the Human Resources/Affirmative Action Office, that department is not to discuss the matter or release any information or documents to the outside agency or party. For discriminatory charges, the department is to immediately notify the Affirmative Action Office. For a non-discriminatory grievance, the department is to immediately notify the appropriate Human Resources Office. Information concerning grievances and discriminatory charges are considered confidential and the correspondence is not to be shown or discussed with others in the department or University, except the immediate supervisor and department head. The appropriate Human Resources Office or

Affirmative Action Office will make all contacts with outside agencies or attorneys with respect to grievances or discriminatory charges filed with them

PROCEDURE: In processing grievances, the following steps will be used in all cases:

Step I

A. A grievant is to discuss the grievance with the immediate supervisor in an effort to resolve the matter informally within five working days after the act or condition on which the grievance is based comes to the attention of the grievant, or at any time if the act or condition being grieved is of a continuing nature. The supervisor should consider special circumstances which may prevent a grievant from adhering to the time limit(s). The supervisor will give a response to the grievant within five working days from the date of initial discussion.

B. If the grievance is not resolved, the grievant must discuss the grievance with the department chair within five working days after receiving the immediate supervisor's answer. The department chair will give a response to the employee within five working days after the date of the discussion.

Step II

A grievant who does not agree with the decision at Step I may proceed within five working days of that decision to discuss the grievance with the next level of authority above the immediate supervisor as follows:

A. If the next level of authority above the immediate supervisor *is not* a vice president:

1. Discuss the issue with the next level of authority above the

immediate supervisor.

2. A written response to the grievant will be given to the grievant within ten working days of the discussion.
3. If the decision does not result in a settlement agreeable to the employee, the grievant may, within five working days of receiving the written decision, make a written appeal specifying the exact nature of the grievance and the remedy desired to the appropriate Human Resources Office.
4. The appropriate Human Resources Director will investigate the issue within five working days after receiving the appeal, interview appropriate witnesses, review all relevant files and documents, and convene a meeting with the employee, the employee representative (if any), the immediate supervisor, and the department chair to review the case and resolve the grievance if possible. The Human Resources Director will have five working days to submit a response to the grievant.

B. If the next level of authority above the supervisor *is* a vice president:

1. If the decision at Step I does not result in a settlement agreeable to the employee, the grievant may, within five working days of receiving the decision, make a written appeal specifying the exact nature of the grievance and the remedy desired to the Associate Vice President for Human Resources and Affirmative Action.
2. The appropriate Human Resources Director will investigate the issue within five working days after receiving the appeal, interview appropriate witnesses, review all relevant files and documents, and convene a meeting with the employee, the employee representative (if any), and the immediate supervisor to review the case and resolve the grievance if possible. The

Human Resources Director will have five working days to submit a response to the grievant.

C. In cases where the immediate supervisor is a vice president:

1. The grievant may, within five working days of receiving the written decision, make a written appeal specifying the exact nature of the grievance and the remedy desired to the Associate Vice President for Human Resources and Affirmative Action.
2. The Associate Vice President for Human Resources and Affirmative Action will investigate the issue within five working days after receiving the appeal, and resolve the grievance if possible.

Step III

A grievant who does not agree with the decision at Step II and wishes to proceed with the grievance, must submit a written request for a panel hearing within five working days from the decision at Step II to the appropriate Human Resources Office, which will convene a grievance panel within ten working days. A copy of the grievance and the desired remedy will be sent to the appropriate vice president.

Grievance Panel Guidelines

The grievance panel shall be composed of *three* employees and *one* alternate. The panel will be selected from a list of names compiled by the appropriate Human Resources Office.

Within five working days after receiving the request, the appropriate Human Resources Director or designee, the grievant and a department administrative representative will select a panel from a list of names provided by the appropriate Human Resources Office. Any member may be challenged for cause by either the grievant or departmental representative. Any member of the panel who has been challenged may be disqualified for cause as determined solely by the Human Resources Director or designee.

Members of the panel shall elect from among themselves a chairperson whose function is to preside over meetings. The panel may adopt operating procedures, review evidence, and determine the eligibility of witnesses as it deems appropriate by a majority vote of the members. Proceedings of the panel should be recorded in a manner deemed appropriate by the members of the panel. The chairperson shall also write or direct the writing of the panel's opinion and recommendation(s) with respect to each grievance. The panel's opinion and recommendation(s) should contain sufficient particularity and justification.

The Director of Human Resources or designee is present at all meetings of the panel, but does not hold voting privileges. The panel shall meet with the grievant, the supervisor, and other employees of the University as necessary to resolve the grievance, and to render an opinion and recommendation(s) within ten working days of its being convened by Human Resources. By a majority vote of the members, the ten working days period may be extended an additional ten working days.

The panel's opinion and recommendation(s) shall be submitted by the chairperson through the Human Resources Office to the appropriate vice president with copies to the grievant and immediate supervisor. If the vice president's decision agrees with the panel's opinion and recommendation(s), whether the opinion and recommendation(s) are favorable or unfavorable to the grievant, the grievance is considered settled and the grievant cannot proceed to Step IV.

Step IV

If the grievant's vice president disagrees with the opinion or recommendation(s) of the panel, the grievant may appeal in writing to the President within ten days of receiving the vice president's decision. The President or designee shall render final decisions on grievances at this step as soon as possible with notification to all concerned parties.

The opinion and recommendation(s) of the panel and the decision of the vice president, President or designee, as applicable, shall be maintained in the employee's personnel file in the appropriate Human Resources Office. All records and documents received in evidence are maintained separately from the employee's personnel file and retained in the Human Resources Office.

ADDENDUM TO POLICY F-5
Revised 3/94

GRIEVANCE FORM
REQUEST FOR GRIEVANCE REVIEW

Employee Name: ______________________________ Date: ____________

Employee Address: ____

______________________________ Home Tel. No.: ____________

Department: ______________________________ Job Title: ____________

Immediate Supervisor: ______________________________ Office Tel. No.: ____________

Department Chair: ______________________________ Office Tel. No.: ____________

Dean or Division Head: ______________________________ Office Tel. No.: ____________

I have discussed my grievance with my supervisor, department chair, dean or division head, and their responses were not acceptable to me. Therefore, in accordance with the Grievance Procedure, I am requesting a review by the Office of Human Resources.

NOTE TO THE GRIEVANT: Submit the following information. What is the grievance? When did it happen? When did you find out about it? Where did it happen? How did it happen? Who is involved? In your opinion, why did it happen? What was the dean or division head's response to your grievance? ATTACH SUPPORTING DOCUMENTS IF NECESSARY.

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Specifically, I request that the following action be taken as a remedy to my grievance.

____

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Signed: ______________________________ Date: ____________
(Employee)

NOTE: THIS FORM MUST BE COMPLETED AND SUBMITTED TO THE DIRECTOR, HUMAN RESOURCES WITHIN 5 WORKING DAYS AFTER THE DEAN OR DIVISION HEAD'S REPLY HAS BEEN GIVEN AT STEP II OF THE GRIEVANCE PROCEDURE.

Oakland University

"Problem Adjustment Procedure"*

Section XVI

PROFESSIONAL ORGANIZATIONS

1. Two professional organizations are active at Oakland University. Their purposes as set forth in the Constitution By-Laws, are quoted as follows:

2. AP Association:

> "Purpose: The purpose of the Oakland University Administrative-Professional Association shall be to serve as a voluntary organization dedicated to the social, professional and financial welfare of Administrative-Professional employees at Oakland University. The Association provides a means of communication between all Administrative-Professional employees and the University as employer in matters concerning wages, hours, and working conditions. The Association strives to promote a climate wherein the University can best fulfill its role and mission and still offer opportunities for professional contribution, professional development, and job security for its Administrative-Professional employees."

This is a voluntary organization open to all AP staff members. Action and voting participation is subject to payment of established dues.

3. AP Assembly:

> "Purpose: The Assembly shall seek an active role for Administrative-Professional staff in the governance of the University in all matters concerning the personal, professional, and economic welfare of its members. The Assembly shall not represent its members with regard to wages, hours, or working conditions and shall not act as a collective bargaining representative of its members."

Section XVII

ADMINISTRATIVE-PROFESSIONAL PROBLEM ADJUSTMENT PROCEDURE

A Problem Adjustment Procedure for Administrative-Professional Employees

In working together from day to day, it is normal that people have problems, misunderstandings, and differences of opinion affecting their working relationship. While most differences can be worked

(*Note: This grievance process applies only to non-union administrative-professional employees.)

out amicably between the AP staff member and his supervisor, it is realized that this is not always accomplished. Therefore, in order that an AP staff member, who has a complaint which he feels deserves attention, may have a systematic and orderly method of presenting a complaint or difference of opinion relating to wages, hours, or conditions of employment, the following Problem Adjustment Procedure is established.

Step I

The AP staff member should discuss his complaint with his immediate supervisor. The AP staff member may ask to have a representative of the Administrative-Professional Association present while his complaint is being discussed with the supervisor. The complaint must be discussed with the supervisor within fourteen calendar days of its occurrence.

Step II

If the AP staff member's complaint is not resolved by Step I within five working days of its presentation to the supervisor, it should then be stated in writing by the AP staff member and submitted to his immediate supervisor. The AP staff member and his representative, if any, should then meet with the supervisor to review the complaint again. Subsequently, the supervisor should state his decision in writing on a suitable form not later than five working days after the complaint has been submitted to him, unless the parties agree mutually to extend the time.

Step III

If the AP staff member is not satisfied with the decision of his immediate supervisor, a written appeal may then be filed by the AP staff member to the department head or administrative head of the division. This appeal must be submitted by the AP staff member within five working days after the date of the immediate supervisor's answer as provided for in Step II of the Problem Adjustment Procedure. After receiving this appeal, the department head or administrative head shall request the initial report of the AP staff member, the AP staff member's representative, if any, and the immediate supervisor in an effort to negotiate a satisfactory settlement. It is the responsibility of the department head or administrative head to see that all concerned parties who should participate in the discussion are present. The department head or administrative head will render a written decision on the prescribed form within five working days of the submission of the appeal unless the parties agree mutually to extend the time.

Step IV

If the complaint is not settled at Step III of the procedure, the AP staff member may then file a written appeal with the Director of Personnel. This appeal should be submitted within five working days after the AP staff member receives an answer as provided in Step III. A conference will then be arranged by the Director of Personnel with the complainant and his representative, if any. At the conclusion of the problem adjustment conference, the Director of Personnel shall render a decision in writing on the prescribed form. Step IV of the procedure shall take no longer than ten working days unless extended by mutual agreement.

Step V

An appeal board shall be constituted to resolve those complaints not settled at Step IV. The appeal board shall consist of two persons designated by the University and two persons designated by the Executive Committee of the Administrative-Professional Association to represent the AP staff member. The fifth member of the appeal board shall be jointly selected by the other members of the board. A majority decision of the appeal board shall be final and binding to the University and to the complainant.

If the appeal board finds that there was a violation of official University policy, rule, or procedure, or other term of the employment contract, the appeal board may by majority decision determine that the violation be corrected in accordance with University policies. A decision by the appeal board shall not (a) conflict with local, state, or federal law or regulation; (b) conflict with official University policies, rules, and procedures or add to, subtract from or otherwise modify them; (c) alter the employment contract terms of the AP employee; or (d) limit the responsibility or authority of the University to manage and conduct its business.

Implementation.

Any AP staff member who has completed his probationary period and who has been suspended or discharged for "just cause" may, within five working days of its occurrence, file a written complaint with the Director of Personnel as Step IV in the Problem Adjustment Procedure. Complaints of this nature should be settled at the earliest possible time and shall take precedence over complaints of a different nature.

(revised 7/13/93)

VI. CONCLUDING THE EMPLOYMENT RELATIONSHIP

WRONGFUL TERMINATION REVISITED -- JUST WHEN YOU THOUGHT IT WAS SAFE TO DISCHARGE

Wrongful termination verdicts that reach into the millions are getting attention nationwide. Wrongful termination litigation has expanded beyond the implied contract and public policy areas to cover state tort claims as well. Motivated plaintiffs' attorneys are asserting creative legal theories, and disgruntled and often bitter plaintiffs are making remarkable allegations. Jury awards in wrongful termination cases can, in some cases, exceed wrongful death awards.

Wrongful termination awards are not only becoming more severe, they are becoming increasingly frequent. A recent study released by the Bureau of National Affairs estimates that the number of wrongful termination cases has more than doubled in the last decade. Similarly, a recent survey of over 1000 human resource executives found that more than half of them claimed that terminating an employee in the past year resulted in some type of legal action and that about forty percent of those cases resulted in substantial settlements or awards. We will explore the trend setting cases across the country and discuss what management must know today to survive the '90's.

I. EMPLOYMENT AT-WILL

The traditional principal that has governed employment relationships in the United States is known as the "employment at-will doctrine." Every state except Montana follows the general rule that an employer may discharge an employee without restriction, that is, for any reason or no reason, without incurring any liability to the employee. The numerous exceptions to this rule, however, make reliance on the at-will doctrine inadvisable.

II. EXCEPTIONS TO THE EMPLOYMENT AT-WILL DOCTRINE

The last two decades have brought with them substantial changes and exceptions to the employment at-will doctrine. While there are still courts all over the country making decisions which reaffirm the employment at-will principle, the general trend reflects erosion of the rule. Further, recent decisions indicate that we may expect an even greater erosion in the future. We will first examine the various legal theories being used by former employees to challenge the discharge decisions of their employers.

The exceptions to the traditional at-will rule fall into certain general categories, including:

1. Wrongful termination in violation of public policy;

2. Wrongful termination in violation of an oral, express or implied contract; and

3. Wrongful termination in violation of an implied covenant of good faith and fair dealing.

In addition, and perhaps more importantly, other common law causes of action have been claimed in the employment context including slander/defamation, intentional/negligent infliction of emotional distress, fraud/misrepresentation, negligence, assault/battery, false imprisonment, invasion of privacy, and interference with contract/interference with prospective advantages. Also, the so-called "employer negligence cases" are another significant development. Employers have been accused of negligent hiring, negligent entrustment, negligent retention, and negligent training. Finally, and perhaps most frightening, are the recent line of cases which hold managers individually liable for workplace torts.

A. Wrongful Termination In Violation Of Public Policy

Exceptions to the employment at-will doctrine were first found in cases where employees alleged that their discharge was somehow in violation of a state recognized "public policy." In order to maintain a cause of action under this theory, an employee must identify a cognizable state-recognized public policy. What constitutes public policy or whether this theory is recognized at all varies dramatically from state to state, but the majority of states have allowed some form of public policy exception to the employment at-will doctrine.

It is not entirely clear what constitutes a valid public policy. Early cases compared an employer's conduct against public policies described in broad, general terms. *See, e.g., Nees v. Hocks*, 536 P.2d 512, 515, 516 (Or. 1975) (finding discharge violated public policy due to employers "socially undesirable motive" which contravenes values "high on the scale of American institutions and citizen obligations"); *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551 (N.H. 1974) (finding that discharge "motivated by bad faith or malice or based on retaliation" violates public policy); *Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 188 (Cal. Ct. App. 1959) (holding that public policy prohibits "whatever contravenes good morals or any established interests of society").

More recent cases attempt to link public policy to some specific statute or other specific identifiable state concern. For example, in *Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285 (9th Cir. 1987), a valid public policy claim was stated where an employee alleged that he was fired in retaliation for refusing to violate the State Department of Insurance guidelines.

Similarly, in *Adler v. American Standard Corp.*, 830 F.2d 1303 (4th Cir. 1987), the exception was limited to situations involving actual refusal to engage in illegal activity or the intention to fulfill a duty prescribed by statute. Most states have held that absent explicit legislation prohibiting discharge, an employee states a claim under this theory only where the alleged reason for discharge was either the employee's failure or refusal to violate law, or the employee's exercise of a right conferred by well-established legislative enactment.[1/] *See, e.g., Delaney v. Taco Time International, Inc.*, 681 P.2d 114 (Or. 1984); *Grzyb v. Evans*, 700 S.W.2d 399 (Ky. 1985); *Sheets v. Teddy's Frosted Foods. Inc.*, 471, 427 A.2d 385 (Conn. 1980).

Another public policy exception to the at-will doctrine is the "whistleblower" exception. Employees who report violations of law or public policy to appropriate government agencies or company officials are commonly referred to as "whistleblowers." This exception is the public policy category that courts have been the least willing to recognize, but it is becoming increasingly common. *See, e.g, Maus v. National Living Centers, Inc.*, 633 S.W.2d 674 (Tex. App. -- Austin 1982, writ ref'd n.r.e.): *Phung v. Waste Management. Inc.*, 491 N.E.2d 1114 (Ohio 1986) (preferring to leave recognition of a whistleblower cause of action to the legislature); *see also* Ohio Rev. Code Ann. §§ 4113.51-53 (Anderson 1991) (following the opinion in *Phung* the Ohio Legislature did enact a whistleblower protection statute).

Jennings v. Marralle, 21 Cal. Rptr. 2d 562 (Cal. Ct. App. 1993) demonstrates exactly how far courts are willing to go to find a violation of public policy in a discharge situation. In *Jennings* the plaintiff sued her employer, a dentist, for age discrimination. The case was summarily dismissed, however, because the California statute prohibiting age discrimination does not apply to employers with five or fewer employees. The

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[1/] Note that the courts typically will not permit a separate cause of action for retaliation if the statute upon which the violation of public policy is based provides remedies for its breach. For example, there is no independent public policy cause of action for an employee who is discharged for filing a workers' compensation claim if a statutory claim exists. The employee's exclusive remedy under those circumstances would most likely be under the workers' compensation statute.

plaintiff then moved to add a cause of action for wrongful termination in violation of public policy based on age discrimination. In an unprecedented move, the appeals court allowed this cause of action despite the apparent legislative intent not to hold small employers liable under these circumstances.

B. Written, Oral And Implied Employment Contracts

An employee may attempt to show that the employment at-will doctrine does not apply because he or she was employed pursuant to a written, oral or implied employment contract that directly or indirectly limited the employer's right to terminate the employment at-will.

1. Modification Based On Oral Statements

Contrary to popular belief, except under limited circumstances, oral contracts are just as enforceable as written contracts, although they are obviously more difficult to prove. (Remember the old chestnut -- "An oral contract is not worth the paper it's written on?") In some cases, these so-called oral contracts have even been held to modify written documents. For example, in *Lindsey v. University of Arizona*, 754 P.2d 1152 (Ariz. Ct. App. 1987) an athletic director's statements that coaches are given a minimum of four years before being evaluated, were held to have modified a letter from the president of the university which stated that the coaching assignment was not a contract and could be terminated at-will.

The common law doctrine known as the Statute of Frauds may provide one source of protection to employers facing an alleged oral contract. The Statute of Frauds requires that contracts which are not to be performed within one year from the date of making either be in writing or be included in some sort of written memorandum. The courts that have recognized the applicability of the Statute of Frauds in these situations have typically required an employee to prove that he or she and his or her employer had a contract in writing which limited the right of the employer to terminate the relationship at-will. *See, e.g., Stiver v. Texas Instruments*, 750 S.W.2d 843 (Tex. App. -- Houston 1988). Obviously these cases will not protect an employer who places commitments to employees in writing. All written communication to employees should, therefore, be carefully drafted.

2. Implied Contracts Based On Handbooks

Employer handbooks are the most widely accepted and used source for finding an implied contract. Employees and their attorneys have been very crafty in examining the provisions of handbooks to find language that limits an employer's right to discharge an employee at-will. In fact, the disciplinary provisions of handbooks have proven to be an excellent source for plaintiffs' claims that the employer has contratually limited his right to discharge. In these cases, the employee claims that the termination violates some procedure outlined in the handbook. Employees often claim, for example, that they were not given a written warning or suspended before their termination, or that a hearing was not held to investigate the allegations leading to discharge. In many cases, these are merely technical violations of handbook guidelines, but they can create high liability.

Employers often try to protect themselves by putting contractual disclaimers in their handbooks. A handbook disclaimer will not, however, automatically defeat the employee's claim that the handbook contains contractual rights. In *Zaccardi v. Zale Corp.*, 856 F.2d 1473 (l0th Cir. 1988) the court held that because the contract contained specific contractual terms, it could form the basis of an implied contract even though it had a disclaimer which read:

> This manual is not intended and shall not be interpreted to be a formal legal contract, binding on the company.

856 F.2d at 1476 n.5 (emphasis omitted).

Stronger disclaimers requiring an acknowledgment of the disclaimer by the employee, however, can be effective to prevent the formation of an implied contract. *See Chavez v. Manville Products Corp.*, 777 P.2d 371 (N.M. 1989). The actual results in implied contract cases vary widely from state to state. Any disclaimer should, therefore, be carefully examined to ensure that it is the most appropriate and effective language possible under the law in the states where your employees work. *See* discussion *infra* part IV.C.

3. Contracts Based On Employer Practices And "Context"

A recent, but troubling trend, is that courts have based their findings of implied contracts of employment on the unpublished, undisclosed, and unwritten employment practices of an employer. Some states have even held that an implied contract of employment can be inferred from a combination of factors only some of which suggest contractual intent on the part of the parties. *See, e.g., Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (Cal. 1988). The court in *Foley* held that

> [i]n the employment context, factors apart from consideration and express terms may be used to ascertain the existence and content of an employment agreement, including the personnel policies or practices of the employer, "the employee's longevity of service, actions or communications by the employer reflecting assurances of

> continued employment, and the practices of the industry in which the employee is engaged."

Id. at 680 (quoting *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 327 (Cal. Ct. App. 1981)).

Most other states have not gone quite as far as California, but a cause of action for implied contract is expressly recognized in several other states. In an interesting case out of New Mexico, the court stated:

> In overcoming the presumption [of at-will], it is not any single act, phrase or expression, but the totality of all of these, given the circumstances and the parties' situation and objectives, which will control.

Kestenbaum v. Pennzoil Co., 766 P.2d 280, 286 (N.M. 1988), *cert. denied*, 490 U.S. 1109 (1989).

The *Kestenbaum* court found that one of the reasons the employee was not "at-will" was because the company's personnel department did not normally terminate employees at-will. Instead, they tried to be fair in terminating employees. The court implied that this internal policy of fairness somehow became binding upon the company as an enforceable contract for its employees. *See id.*

Clearly such factors as the employees longevity of service or the practices in the industry have nothing to do with whether or not there is an actual agreement between the employer and the employee, but instead reflect the growing willingness of courts around the country to "whittle" away at the termination at-will rule. These factors -- instead of steering one to the conclusion that a contract was formed -- are considerations of what the court or society thinks would be "fair." Like it or not, courts around the country think that it is more "fair" to give long-term employees rights to their job and are, therefore, more willing to imply these rights in contract.

A few states will even permit punitive damage awards for breach of an implied or express contract of employment upon proof of bad faith by an employer during the course of the plaintiff's employment or in the manner and method used to terminate him or her.

C. Implied Covenant Of Good Faith And Fair Dealing

Although California will allow a contract action for breach of an implied covenant of good faith and fair dealing, most states do not recognize this as a separate cause of action in the employment context. This, too, is a theory of recovery that can be stretched to fit a variety of circumstances.

D. Tort Theories Of Recovery

Generally, an employee suing his or her employer for wrongful termination will include both contract theories as well as tort theories of recovery. Tort theories are proven differently than contract theories and generally permit significantly increased damage awards. Additionally, causes of action for wrongful termination sounding in tort can be more difficult to dismiss on a legal motion than are contract claims of unlawful discharge. The tort theories which are commonly used in the employment context include: (1) wrongful termination; (2) intentional infliction of emotional distress; (3) fraudulent misrepresentations; (4) interference with contractual relations; (5) outrageous or abusive discharge; and (6) slander and libel. In addition, a relatively new cause of action which is not even necessarily termination-related has developed: employer negligence in hiring, training, retention and entrustment.

1. Tort Of Wrongful Termination

Thus far there is no recognized general tort of wrongful termination in most states. Instead, the employee must try to fit his case into one of the exceptions to the employment at-will rule discussed above (*e.g.*, implied contract).

2. Intentional Or Negligent Infliction Of Emotional Distress

Employees often include the tort of intentional infliction of emotional distress in lawsuits involving any of the claims enumerated in this paper. Although this tort is widely recognized, employees have found it difficult to meet its stringent prerequisites. To recover under this theory, the employee must be able to prove that the employer's conduct was intentional and extreme or outrageous. *Severe* emotional distress must also actually result from the employer's conduct. Generally, employees are not able to allege conduct which is sufficiently outrageous and are unable to prove that they have suffered severe emotional distress.

If proven, however, this tort can turn an otherwise limited liability case into a damages bonanza. To date, Texas has experienced the highest wrongful termination jury awards in the country. The Dallas jury decision in the case of *Layman v. Xerox Corp.* (N.D. Tex. 1990), is a case in point. The case was filed by forty-seven-year-old Elizabeth Layman. Xerox transferred Ms. Layman, a software marketing manager, from Dallas to California. Ms. Layman prepared for the move and sold her home. Once she arrived in California, however, Xerox informed Layman that her position had been changed to an entry-level one. When Ms. Layman attempted to refuse the transfer, she was fired. Ms.

Layman prevailed on her age discrimination claims, but her damages under the Age Discrimination in Employment Act ("ADEA") were limited to actual lost wages plus an equal amount of liquidated damages. These damages totaled $145,000.00. The jury went on, however, to award Ms. Layman another $140,000.00 for pain and suffering and **$8.8 million** in punitive damages for emotional distress and fraud claims.

Even in California, where the California Supreme Court attempted to limit punitive damages, jury awards in emotional distress cases are still staggering. *See Foley*, 47 Cal. 3d 654. For example, in *Hunio v. Tishman Construction Corp.*, 14 Cal. App. 4th 1010 (Cal. Ct. App.), *review granted*, 20 Cal. Rptr. 2d 787 (Cal. 1993), the California court of appeals recently affirmed a jury verdict in an age discrimination/constructive discharge case for $7.1 million -- $4 million of which represented emotional distress damages.

3. Fraudulent Misrepresentation

An employee may charge an employer with fraudulent misrepresentation concerning various terms and conditions of employment or misrepresentations concerning job security. If the employer made a promise with the intention, desire, or purpose of deceiving and/or not performing the obligation, the promise may amount to fraudulent misrepresentation. Plaintiffs find this cause of action attractive because it can support a claim for punitive damages.

4. Tortious Inference With Contractual Relations

Discharged employees across the country have brought "interference with contract" suits against the supervisor who made the decision to discharge them. Fortunately, these suits have largely been unsuccessful. In general, corporate directors, officers, and employees are not liable for interference with contract because they are considered parties to the contract. *See* Thomas G. Fischer, *Liability of Corporate Director, Officer, or Employee For Tortious Interference With Corporation's Contract With Another*, 72 A.L.R. 4th 492 (1989). However, corporate employees can be liable for interfering with the contracts of other employees if their actions were outside the scope of their employment. *See Lindsey v. Demsev*, 735 P.2d 840 (Ariz. 1987). For example, a supervisory employee might be liable for interference with contract if the supervisory employee terminated the suing employee for spurning the supervisory employee's sexual advances. *Tash v. Houston*, 254 N.W.2d 579 (Mich. Ct. App. 1977).

Like other tort claims, interference claims are becoming increasingly popular because punitive damages can be awarded. Moreover, plaintiffs' lawyers believe that a corporate officer is more likely to want to settle a case if the officer has been sued and could be held personally liable, as well as the company. However, absent unusual facts, these claims are routinely dismissed via summary judgment.

5. Defamation

Defamation claims are one of the more popular tort causes of action brought by employees against their employers or former supervisors. In most of these cases, the employee claims the reasons for the discharge are false. Employees, however, must be able to prove far more than that the reasons for their discharge were untrue in order to recover in a defamation action. One of the more difficult prerequisites to recovery is the "publication" requirement. Defamation is not actionable unless it has been published by the defendant. The term "publication" does not mean that the defamatory statement has to be in a newspaper or otherwise in print. It simply means that the statement must be circulated by the defendant. Some states have, in effect, bypassed the publication requirement through a theory called "compelled" or "self publication." *See, e.g., Lewis v. Equitable Life Assurance Society of the United States*, 389 N.W.2d 876 (Minn. 1986). In a typical self-publication case, the employee claims that he was forced to disclose the false reasons for his discharge during his attempts to secure new employment.

6. Employer Negligence In Hiring, Training, Retention And Entrustment

Recently, former employees have begun to sue employers for negligent hiring and training of their employees. The general rule is that an employer will be liable if it fails to exercise ordinary care in selecting employees. The burden is on the employer to investigate the background of its perspective employees and to hire individuals who are fully competent and qualified for the job in question.

An action for negligent entrustment normally involves an allegation that the employer entrusted a dangerous instrumentality to an employee who was incompetent, unqualified, or reckless. For example, hiring an employee to drive the company truck who has a long record of DWI convictions and currently has a suspended license could suscept the company to liability if the employee injures another while driving drunk in the company truck.

This cause of action may also apply in cases where an employer negligently retains in its employment an individual who is known to be potentially dangerous to co-workers or customers. A good example would be an employee who is known for a propensity for violence or sexual harassment. *See, e.g., Hogan v. Forsyth Country Club Co.*, 340 S.E.2d 116 (N.C. Ct. App. 1986). This case involved an employer in North Carolina who retained an employee against whom other workers consistently brought complaints of sexual harassment. A cause of action for negligent retention may also be applicable where an employer has reason to know that the employee abuses alcohol or drugs and such abuse ends up causing harm to a third party or co-worker. *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307 (Tex. 1983).

An employer's failure to adequately train and supervise employees may also create liability. In one decision an employer was found negligent for failing to hold safety meetings that emphasized proper communication between Hispanic and English-speaking crew members. *Exxon Corp. v. Roberts*, 724 S.W.2d 863 (Tex. App. -- Texarkana 1986, writ ref'd n.r.e.). Also, claims of gross negligence are frequently based on an employer's failure to instruct its employees concerning Occupational Safety and Health Administration guidelines.

A recent trend with regard to this tort is to "bootstrap" a negligent training action to an allegedly wrongful termination. In a recent Texas case, *Borden Inc. v. De La Rosa*, 825 S.W.2d 710 (Tex. App. -- Corpus Christi 1991, writ granted),2/ the alleged negligent training of the supervisor supported in part the jury's verdict of $11 million against employer Borden. In that case, the employee claimed that Borden had failed to adequately train its supervisors on the non-retaliation requirements of Texas Workers' Compensation Act. The plaintiff's termination was the evidence used to support the negligence claim.

E. Statutory Exceptions To The At-Will Doctrine

1. Federal Exceptions

There are many federal statutory exceptions to the at-will doctrine including:

a) The National Labor Relations Act;

b) Title VII of the Civil Rights Acts of 1964;

c) The Equal Pay Act of 1963;

d) The Age Discrimination in Employment Act;

e) The Rehabilitation Act of 1973;

2/ This judgment was vacated by 831 S.W.2d 304 (Tex. 1992) because the parties reached a settlement while the case was on appeal.

f) The Civil Rights Act of 1991;

g) The Occupational Safety and Health Act of 1970;

h) The Employee Retirement Income Security Act of 1974 ("ERISA");

i) The Fair Labor Standards Act of 1938;

j) The Employee Polygraph Protection Act of 1988; and

k) The Worker Adjustment and Retraining Notification Act of 1988.

2. State Exceptions

In addition, many state legislative exceptions to the employment at-will doctrine exist. These various state statutes prohibit discharges for such things as expressing political beliefs, exercising voting rights, serving on a jury, or filing a workers' compensation claim.

F. Manager's Individual Liability

Managers and supervisors of all types, including personnel managers, are routinely named as defendants in state and federal court cases filed by present and former employees. One reason for this is tactical; the manager or supervisor is understandably frightened that he or she is a party to what could prove to be a long, drawn-out court battle. There is sound basis for this fear; increasingly, managers and supervisors are being held personally liable for violating any number of federal and state laws related to employment. Further, some cases say that the company, for public policy reasons, cannot reimburse the manager if he or she is held liable. Although companies may view employment-related litigation as a necessary evil or a cost of doing business, managers who are forced to pay out of their own pockets for violations may view the lawsuits differently.

Personnel managers and other supervisors are being held liable not only for their direct acts of harassment or discrimination but also for the acts of other workers and supervisors about which the managers have knowledge. Thus, personnel managers are perceived, in a sense, to have a special duty in the work place. An awareness of and a decision to tolerate acts of discrimination or harassment may be viewed by the courts as sufficient reason to hold the personnel manager personally and individually liable for any judgment rendered.

For example, in *Robson v. Eva's Super Market, Inc.*, 538 F. Supp. 857 (N.D. Ohio 1982), a meat department counter clerk sued the supermarket and her supervisors. The plaintiff had resigned from her job after several months because of job-related sexual harassment. The plaintiff claimed that she became the subject of frequent sexual advances and harassment from a meat cutter in her department, Eugene Mayfield. Mayfield asked the plaintiff to wear tight clothing and to perform work in his vacinity so that he could watch her walk by. He also continuously used profane and suggestive language and leered at her. The plaintiff, on several occasions, informed Mayfield and her supervisor that the conduct and words were unwelcome and offensive. Plaintiff's supervisor told the plaintiff not to pay attention to Mayfield and not to let his conduct bother her. Plaintiff claimed that her manager never reprimanded Mayfield for his conduct nor directed him to stop.

After one particularly insulting incident, the plaintiff confronted Mayfield in front of her supervisor and demanded an apology and a promise that the sexually offensive conduct would stop. Mayfield responded by grabbing the plaintiff by her smock, pulling her face to his, referring to her in an offensive and sexually profane way, and then pushing her away. Mayfield did all of this in front of the plaintiff's supervisor, who reportedly was laughing at the situation. Plaintiff told her supervisor that if he would not put a stop to Mayfield's offensive behavior, she would resign. Her supervisor told her she need not give notice and need not report for work the next day.

In disposing of the supervisor's motion to dismiss the plaintiff's claims against him, the court denied the motion and held that a supervisor may be personally liable from employment discrimination where the supervisor acquiesces in or condones unlawful acts of discrimination practiced by subordinates.

Employers should endeavor to make sure that their supervisors and managers are fully aware of the restrictions placed upon the employer and the manager by federal and state employment laws. Supervisory training is perhaps the most effective tool in the prevention of sexual harassment and other violations of employment laws. A management training program within the company, highlighting not only the applicable and relevant law, but also the severe, and real, penalties imposed upon supervisors individually and the companies generally is necessary. Education must be precise and frequent. The managers and supervisors need to understand that they may be held *individually* liable, in addition to any liability on the part of the employer. They must also understand that it is quite possible the court will not allow the employer to reimburse them if they are held liable for violating employment laws.

Periodic management briefings, with a special emphasis on the business-related costs and consequences of violating the law, may help managers and supervisors gain an understanding of the broad definition of sexual harassment as well as the potential application of other employment-related laws. It is necessary to make certain that all levels of management appreciate the seriousness of these issues both in terms of employee relations and potential liability. Supervisors should be instructed to take prompt action with respect to all complaints of sexual harassment, and to investigate other complaints or perceived violations of applicable laws. Supervisors and managers should encourage immediate consultation with appropriate personnel or employee relations professionals to discuss potential problems.

III. CONSTRUCTIVE DISCHARGE

In today's climate, employers can be sued for wrongfully terminating someone they never terminated. This theory is called "constructive discharge." A constructive discharge occurs when an employer causes an employee's working conditions to be so difficult or unpleasant that a reasonable person would feel compelled to resign. In other words, when working conditions are objectively "intolerable" because of aggravating factors, an employee who quits is considered to have been "constructively discharged" and will be treated as if the employer fired him. *Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61 (5th Cir. 1980); *Clark v. Marsh*, 665 F.2d 1168 (D.C. Cir. 1981); *EEOC Compliance Manual* § 612.9(a).

To make a case of unlawful constructive discharge, a plaintiff in a job discrimination case must show by a preponderance of the evidence that he was forced to quit as a result of intolerable working conditions imposed by the employer, who was motivated by racial or other unlawful bias. *Saltzman v. Fullerton Metals Co.*, 661 F.2d 647 (7th Cir. 1981). The Fourth, Sixth and Eighth Circuits also require proof that the employer intended to force the employee to quit before constructive discharge can be established. *Bristow v. Daily Press, Inc.*, 770 F.2d 1251 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986); *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987); *Thompson v. McDonald Douglas Corp.*, 552 F.2d 220 (8th Cir. 1977). In circuits that require proof that the employer intended to force the employee to quit, the necessary intent has been established where, for example, the plaintiff showed that a reasonable employer would have foreseen that she would resign rather than be forced to work under the supervisor who was sexually harassing her, without being told if, or when, the supervisor would be replaced. *Wheeler v. Southland Corp.*, 875 F.2d 1246 (6th Cir. 1989).

In contrast, the Fifth Circuit has held that proof of the employer's intent to force the employee to resign by imposing intolerable working conditions is not required. *Bourque*, 617 F.2d 61. The Fifth Circuit standard has been adopted by the Third, Seventh, Ninth (which includes California), and Tenth Circuits as well as by a district court in the D.C. Circuit.

For conditions to be sufficiently "intolerable" to establish constructive discharge, they must be intolerable, not just to the employee involved, but to a reasonable and objective person. For example, the Third Circuit, on April 23, 1993, held that a supervisor's over-zealous supervision of an older employee's work does not support a claim of constructive discharge. *Clowes v. Allegheny Valley Hospital*, 991 F.2d 1159 (3d Cir. 1993). In that case, Clowes claimed that her supervisor recorded everything she did or said, spoke to her in a demeaning manner, and criticized her in front of other employees. Clowes' supervisor claimed that Clowes, a nurse, made too many needle "sticks" in order to start intravenous drug flow. This theory of constructive discharge based on over-zealous supervision, was new and apparently unsuccessful. The court pointed out that although her supervisor may have treated Clowes unfairly, "unfair and unwarranted treatment is by no means the same as constructive discharge." *Id.* at 1162.

On the other hand, a 77-year-old legal secretary in California recently won a $350,000 judgment against a law firm for her claim of constructive discharge for age discrimination. *Dickinson v. Bronson*, No. 938412 (Cal. Super. Ct. June 18, 1993). Testimony during the five-week trial revealed that Dickinson's firm was upset because she refused to retire and asked the attorneys for whom she worked to develop a list of anything she did wrong. The winning piece of evidence came when the plaintiff submitted a memorandum from the office manager to the head of personnel stating that the chief reason for Dickinson to leave was her age.

The California Supreme Court just recently agreed to review an interesting constructive discharge case. *Hunio*, 14 Cal. App. 4th 1010. In *Tishman*, after a two month trial, the jury awarded a former employee a total of $7.1 million for age discrimination and constructive discharge. The verdict included $2.1 million in economic damages, $4 million in emotional distress damages, and $1 million in punitive damages. A fifty-six-year-old executive, Hunio, had served the employer twenty-seven years. He testified that after a confrontation with one of his employer's clients, he experienced approximately eight months of uncertainty about his job status. At one point, Hunio was told that a decision had been made to terminate him, but at a later date was told that he had not been terminated. Hunio testified that he did not know from day to day whether he was being retained or let go and that he had been shocked and demoralized each time younger men were assigned to jobs he was capable of doing. Eight months after the difficulty began, unable to bear the uncertainty of unemployment after twenty-seven years on the job, Hunio entered a psychiatric hospital. His physicians testified that the repeated inconsistent, ambiguous, and conflicting messages from Hunio's superiors, coupled with the threat of loss of his career, his retirement, and his lifetime medical benefits caused him to suffer a severe depression. Hunio's doctor told him it would be detrimental to his health and would seriously undermine his psychiatric therapy for him to return to work. Accordingly, while hospitalized, Hunio resigned.

On appeal, the court affirmed the jury award, but in dicta stated, "[I]t is clear that commerce in California cannot flourish with such multi-million dollar verdicts readily attainable. Legislative caps or limits have been imposed in certain areas of medical malpractice and workers compensation. If the Legislature fails to act in this area, we can see that, in due course, business enterprises will flee the state. It is not our obligation to make the laws, but it is our responsibility to point out where laws are needed." *Id.* at 1034.

IV. PRACTICAL CONSIDERATIONS FOR LIMITING LIABILITY

A. Minimizing Back-Pay Liability

Employers who have been charged with discrimination have -- since the U.S. Supreme Court decision in *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) -- typically have been able to toll the accrual of back-pay liability by unconditionally offering to reinstate the claimant. The purpose of back-pay is to monetarily compensate a victim of discrimination for the amount he or she would have earned absent the discrimination. Recent cases have, however, gradually narrowed this protection. For example, the Eleventh Circuit decision in *Lewis v. Federal Prison Industries, Inc.*, 953 F.2d 1277 (11th Cir. 1992), focused not on whether the employer's offer to reinstate was unconditional, but rather, on whether the claimant's rejection of the offer was reasonable. Because the claimant's rejection was found to be "reasonable," back-pay liability continued to accrue after the offer.

In that case, the claimant was able to prove that his rejection was reasonable based on the harassing atmosphere at work. There was evidence that the supervisor harassed the Plaintiff for two years by scrutinizing his work, moving his desk into an open area, reminding him that he was eligible for early retirement, and threatening to replace him. Further, the supervisor verbally abused the claimant, gave him an unwarranted poor performance review, and falsely accused him of criminal activity. Because of the harassment's effect on his health, the claimant applied for early retirement.

The claimant then filed a lawsuit alleging that he had been constructively discharged because of his age. The employer offered to reinstate the claimant in his former position, but the claimant refused. The trial court determined that the offer of reinstatement was *bona fide* and terminated the accrual of back-pay. On appeal, the Eleventh Circuit agreed that the offer of reinstatement was *bona fide* and unconditional, but found that under the circumstances the claimant was entitled to recover full back-pay because his decision to reject the offer was reasonable.

In light of the *Lewis* decision, an employer should make any offer of reinstatement as reasonable as possible. In other words, consider avoiding job changes such as relocation or different hours which may conflict with school or home schedules. In harassment cases, the employer should avoid reassigning the claimant to the alleged harasser. If the employee rejects the reinstatement offer, the employer should ask the employee to disclose the reasons for his or her rejection. This will allow the employer to examine the claimant's concerns and make a second offer of reinstatement, if appropriate. If the claimant refuses to elaborate or rejects a second offer, the employer will be in a better position to argue that the rejection was unreasonable and therefore the accrual of back-pay is tolled.

B. Training Of Interviewers And Supervisors

The company should take every precaution to avoid any implication that a permanent contractual relationship is being formed. This is especially true with regard to the hiring process. Individuals conducting interviews should be specifically trained not to promise permanent employment and not to make expansive statements such as "you can't get fired so long as you do your job," or "you'll have a job so long as I'm here."

In short, **never say Never.** Never promise an applicant that we "never fire without a good reason," unless you are willing to prove that you had a good reason to fire the person in front of a court and jury. Such statements -- even if the company honestly intends to perform them -- merely result in the company taking on the obligation to prove compliance with the "contract" if termination becomes necessary. As every Human Resources Manager knows, there is a big difference between having just cause for discharge and being able to prove it.

It is always safer for the interviewer to affirmatively state that employment is "at-will." Such statements may seem to put a damper on what is otherwise an enthusiastic interview, but many companies have learned to their detriment that the angelic face before them in the pre-employment interview can hide what turns out to be a devilish personality in the courtroom.

C. Disclaimers

Employers facing the significant erosion of employment at-will may wish to take some protective action. Many employers try to preserve at-will relationships by placing disclaimer language in employment applications and the like. While it is true that disclaimers are important and should generally be included in handbooks, employment applications, and other company documents, the employer is at peril if he does not follow through with consistent human resources management. In fact, competent labor counsel should review all disclaimer language in any company documents to insure that it is as appropriate and effective as possible for the workforce. Courts in different states have interpreted disclaimers differently, so the disclaimers may even need to be adjusted if you maintain workforces in more than one state.

California courts, for example, have placed many restrictions on the use of disclaimers. In *McLain v. Great American Insurance Cos.*, 208 Cal. App. 3d 1476 (Cal. Ct. App. 1989), the plaintiff sued for wrongful discharge even though he had signed an employment application which contained the following language:

> "In consideration of my employment, . . . I agree that my employment and compensation can be terminated with or without cause, and with or without notice, at any time, at the option of either the Great American Insurance Company or myself."

Id. at 1480.

Plaintiff argued, and the court agreed, that this language was not conclusive of at-will status because of the following language which also appeared on the application:

> "I also understand and agree that the terms and conditions of my employment may be changed, with or without cause, and with or without notice, at any time by the Great American Insurance Company."

Id.

The court viewed this paragraph as injecting ambiguity into the application, thereby permitting the plaintiff to prove that, notwithstanding the express at-will language, Great American Insurance had, in fact, adopted a policy of terminating only for cause as evidenced by company personnel manuals and assurances of job security in testimony by company managers.

Even an unqualified disclaimer may not be sufficient to establish at-will status as a matter of law in California. In *Wilkerson v. Wells Fargo Bank*, 212 Cal. App. 3d 1217 (Cal. Ct. App. 1989) (as modified), the bank contended that the express at-will provisions in its employee handbook and operations manual precluded a contrary implied promise. Distinguishing other cases in which employees had signed documents containing at-will clauses, the court held that the bank and the employee had not reduced their employment relationship to an integrated writing. There were, therefore, triable issues of fact to be resolved. The question was whether, in light of both the writings and the unwritten practices, the parties had enforceable expectations as to the term of employment or its manner of termination.

In denying summary judgment for the employer in another recent case, the court held that the existence of an at-will disclaimer in an employee handbook did not preclude the plaintiff's implied contract claim as a matter of law. *Walker v. Blue Cross of California*, 4 Cal. App. 4th 985 (Cal. Ct. App. 1992).

Again, although disclaimer language should be reviewed on a state-by-state basis, the most effective disclaimer language will be an integrated writing stating that the employee may be terminated at any time with or without cause and that nothing in the handbook or policy manual or other writing published by the company is intended to modify the at-will employment status. Further, the employee should be asked to acknowledge in writing that no one in the company has the authority to alter the at-will status unless the director of human resources or the president signs a written agreement to the contrary. Finally, an effective disclaimer should state that regardless of the actions, policies, or procedures of the company, nothing should be taken to alter the employee's at-will status.

The most effective handbook disclaimers appear both at the front and at the end of the handbook. Better yet are disclaimers reiterated on an employee tear-out sheet which is signed and placed in the employee's personnel file.

D. Documents Containing Language On Discipline, Especially Progressive Discipline

If the handbook or any other document contains a description of disciplinary procedures or causes for discipline, exculpatory language should be included which indicates that the plan is a guideline only. The company should specifically reserve the right to modify the plan under the facts of a particular situation and/or accelerate the discipline. Do not limit the possible reasons for discharge in your descriptive language. Always indicate that any list of offenses constitutes "some of the reasons for discharge." Check to make sure all documents are consistent. The disciplinary documents should also refer to the general disclaimer language.

Three more points on discipline: document, document, document.

E. Employment Application

While application disclaimers in employment applications are effective in most states, California has called into question the efficacy of a disclaimer on the face of an employment application. *Harden v. Maybelline Sales Corp.*, 230 Cal. App. 3d 1550 (Cal.

Ct. App. 1991) (finding that the application for employment is not a contract, but merely the solicitation of an offer of employment, so that it cannot preclude consideration of conteporaneous oral agreements not to terminate except for cause).

For employees outside California, companies should strongly consider placing a disclaimer on the employment application. Such disclaimers have been found effective to defeat an implied contract claim based on oral statements:

> "I understand that the only employment contracts are those specifically authorized by [named company official] and which have been placed in writing and signed by [named] Company official. I understand that no employment contract either express or implied will exist should I be hired by the Company. I understand that any oral statements to the contrary are not authorized by company management and should not be relied upon by me."

In correspondence concerning employment or offers of employment, the company should phrase salary in terms of hourly or weekly wages in order to avoid the possibility that the employee or applicant will argue that a reference to an "annual" salary constitutes a commitment to employ the individual for one year. Written offers of employment should also always contain exculpatory language Finally, application forms should provide sound foundation for after-acquired evidence motions. *See* discussion *infra* part V.E.

F. Notices, Bulletins, Letters, Policy Statements

The employer should avoid statements which expressly provide that employees may only be terminated for just cause, for specified reasons, or pursuant to established procedure. Similarly, avoid representations of continued or lifetime employment. Supervisors should be counseled to avoid making such statements. Oral agreements or representations may give rise to enforceable claims for breach of an express or implied contract despite the presence of a disclaimer.

G. Probationary Periods

Probationary periods have long been used successfully by companies to justify lower threshold discharges of very short-term employees. The unemployment boards of many states and the EEOC have long implicitly sanctioned this practice. Suddenly, however, probationary terminology becomes dangerous because of its possible implications. If an employee is "probationary" for sixty days, what is he or she after he completes two months of work? Some employees have argued that attaining non-probationary status implies some degree of protection from arbitrary discharge. In fact, some employers' handbooks specifically state that an employee may be discharged for "any reason" during the probationary period, leaving one with the impression that after the probationary period, the employee is no longer subject to this type of "any reason" discharge.

If a probationary period is used, disclaimer language should be considered. Employers should also scrupulously avoid using the phrase "permanent employee" both in writing and orally. A reasonable alternative to distinguish from the probationary employee is the term "regular employee."

H. Discharge Reviews

Companies can rarely afford to allow front line supervisors to make termination decisions. In the present litigious climate, every company should have a well-trained individual with common sense reviewing and playing devil's advocate before any termination decision is made. Employers should also conduct an investigation appropriate to the facts and issues of the particular case. When the luxury of review is impossible (in cases of theft or serious insubordination), the supervisor should suspend the employee pending review and/or investigation. Every employer, regardless of its size, should adopt a policy which prohibits rash, impetuous or emotionally based discharges.

Termination reports should be carefully reviewed before they are approved. The individual assigned the task of reviewing termination decisions should have the authority to consult an attorney to "run by" the difficult situations. All employers should nurture a relationship with a competent, well-informed labor and employment attorney who has an opportunity to really get to know the company -- both its strengths and weaknesses.

Conduct an exit interview for any departing employee. The company should document any comments made at that time. The company should also investigate any abrupt resignations to determine whether facts exist that might give rise to future liability.

Employers should not entrust unemployment compensation hearings to outside agencies that only handle these cases. These hearings can be a goldmine of information and can provide the employer with ammunition to use later if other litigation results from the discharge. On the other hand, these proceedings can be devastating to the unwary employer who lets loose-lipped supervisors represent the company unassisted. Since statements at these hearings are admissible in other proceedings, it is very important to carefully review any position, not just for its impact on the individual case, but also for the long run.

V. DEFENDING WRONGFUL TERMINATION SUITS

If the preventative measures described above do not keep you from being sued, consider the following defensive measures:

A. Jurisdiction And Venue

One of the first considerations for defense counsel is whether to remove a state court case to federal court. The advantages of removal to federal court include:

1. The need for unanimous jury verdicts;
2. The possibility that the plaintiff will waive his or her right to a jury trial by failure to make a timely demand within ten days after notice of removal (Fed. R. Civ. P. 81(c)); and
3. The familiarity that defense counsel may have with federal court rules.

Removal must be done within thirty days after receipt of the first pleading containing grounds for removal.

There are many possible grounds for removal based upon a federal question (28 U.S.C. §§ 1331, 1337, & 1343) (1988), including: (1) claims covered by a collective bargaining agreement; (2) the complaint raises grievances covered by a collective bargaining agreement; (3) a public policy claim where the claim is based upon federal statutory law; and (4) preemption by ERISA.

Defense counsel should also consider motions for change of venue, as well as possible removal on the basis of diversity jurisdiction.

B. Documentation And Internal Company Investigation

The personnel file and all relevant employment documents should be gathered. Late discovery of a favorable document by the other side can be very embarrassing.

1. Documentation Of Adverse Action By The Employee. While all employee actions should be documented, it is important not to over-document one employee's file in comparison with other employees. Company documents in employment files should never be altered. This is illegal and unethical and could prove very embarrassing if the employee kept an original, unaltered copy of the document.

2. **Interviewing Company Personnel**. Early in the litigation, all the principal players in the termination should be interviewed by the attorney. Any attorney notes should be kept as work product of the interview. Any interview statements or memos written by non-attorney company personnel must usually be produced to the opposing party in the lawsuit.

3. **Multiple Forums (Unemployment Compensation Hearings And EEOC And State Human Rights Commission Hearings).** After they are discharged, many employees will file either discrimination charges or unemployment compensation claims. A contested unemployment compensation hearing before the administrative agency can provide an early method of discovery. Most testimony and statements made in connection with the administrative proceeding will be both discoverable as well as admissible into evidence at trial. This is also true of any hearings before the EEOC, state, or local human rights commissions. In a multiple forum situation, a decision in a prior forum, such as an unemployment hearing, may be determinative if the issue is raised in a later lawsuit. This is called the theory of *res judicata*. Also, collateral estoppel could result: the parties could be estopped to litigate an issue that was resolved in the prior proceeding. These preliminary proceedings should either be carefully coordinated or handled by the same counsel handling the litigation.

C. Early Discovery

In almost every case, defense counsel should take an early and thorough deposition of the plaintiff. This enables the counsel to limit plaintiff's story at the outset, to evaluate the plaintiff as a witness, and will possibly give rise to grounds for removal to federal court that do not appear on the face of the complaint. Company representatives should be present at the plaintiff's deposition, both as an aid to outside counsel (especially to make them aware of facts and misstatements that an outsider would not pick up) and as a subtle reminder to the plaintiff of the confrontational nature of the lawsuit. Employees may have a harder time exaggerating or lying in front of a company representative.

The plaintiff's deposition should usually cover the following subjects:

1. **Plaintiff's Background** -- age, education, family status, health status.

2. **Plaintiff's Employment With The Company** -- hiring, knowledge of company personnel policies, relationships with supervisors at the company, details of plaintiff's performance, internal complaints, plaintiff's attitude towards the job.

3. **Adverse Employment Action** -- perception of unfair treatment, details, grievances, other employees with knowledge.

4. **Post-Termination Activities** -- inquiries into new employment, all income sources and details of subsequent employment.

5. **Mitigation Of Damages** -- efforts to secure new employment, income at new employment. Any back pay awards will be reduced by any post-employment income and a plaintiff has a duty to reasonably seek new employment in order to mitigate his or her damages.

D. Limiting The Issues

Once the case has been removed to federal court (or if the case is not removable), the defendant must decide whether to answer the complaint or to file a motion to dismiss.

Motions to dismiss are frequently filed by defense counsel, but this is often a mistake. The motion serves to educate plaintiff's counsel about the case and may lead him or her to come up with a stronger cause of action or legal theory prior to the discovery stage.

In cases where the defect on the face of the complaint is not subject to amendment, the motion to dismiss can, however, get some causes of action immediately dismissed. Such motions to dismiss are very effective in those cases where, for example, arguments concerning the statute of limitations, Statute of Frauds, workers' compensation as an exclusive remedy, and exclusive federal jurisdictional preemption can be raised to dispose of the entire cause of action.

.For example, the California Supreme Court will soon hear an appeal in *Fermino v. Fedco, Inc.*, 15 Cal. App. 4th 29 (Cal. Ct. App.), *review granted*, 21 Cal. Rptr. 2d 355 (Cal. 1993). In *Fedco*, the court of appeals held that the plaintiff's claims for false imprisonment, intentional infliction of emotional distress, and negligent infliction of emotional distress were barred by the exclusive remedy of the Workers' Compensation Act, even if the injury resulted from intentional or grievous conduct by the employer. The plaintiff in this case, Julie Fermino, while working as a salesperson in the jewelry department, was summoned by the store personnel manager and escorted to a windowless interrogation room. There, she was accused of stealing the proceeds of a $4.95 sale to a customer and threatened with arrest. The security agent and the personnel manager berated Ms. Fermino for more than an hour and refused to let her leave the room. They demanded that she "tell the truth and confess." *Id.* at 32. She was told that a customer and an employee witness were waiting in the next room to confront her. When Ms. Fermino became hysterical, she was allowed to leave the room and was told that there were no witnesses in the next room and that her interrogators believed her. This decision by the California Supreme Court will give employers guidance as to how far workers' compensation as an exclusive remedy for other types of workplace torts may go.

Motions for summary judgment should be filed in almost all wrongful termination cases to remove as many claims as possible from the jury. The factual record obtained during defendant's discovery may provide a strong basis for such a motion. In addition to filing a motion for summary judgment based upon grounds previously discussed or possible motions to dismiss, the defendant should consider filing a motion for failure to state a cause of action where the employee has indicated throughout the course of discovery that he or she was terminated for violation of a company rule which the employee knew to be grounds for termination.

Finally, motions in limine should be used to restrict the admission of evidence at trial that is not relevant or which would be prejudicial. For example, an effort should be made to keep out policies that plaintiff said he or she never relied upon or saw during the course of his or her employment. Additionally, evidence of lack of "due process" in plaintiff's termination should be excluded where the only issue is the reason for termination, or the employer's motive.

E. After-Acquired Evidence

Over the past few years, employers have been attempting to utilize a new weapon in their defense arsenal known as the after-acquired evidence doctrine. At least sixteen federal and state courts have dismissed discrimination claims or reversed jury verdicts based solely on evidence that an employer neither knew about or relied upon *at the time* it terminated the employee. For an employer, discovering such evidence is akin to winning the lottery. Employers have successfully moved for summary judgment or directed verdict on the basis of after-acquired evidence in nearly 80% of these cases.

The use of this doctrine in defense of discrimination suits typically works as follows. After an employee is terminated and has filed a discrimination lawsuit, and during the discovery process, the employer learns for the *first time* of misconduct which the employee committed prior to being terminated. For example, the employer learns that at the time the employee initially applied for the job, he or she misrepresented certain things about him or herself. Or, during employment, the employee engaged in certain misconduct which, if known, would have gotten him or her terminated. By employing this defense, the employer argues that because of this misconduct, the employee either would not have been hired in the first place, or would have been fired before the discrimination occurred. Therefore, the employee is not entitled to any remedy for the subsequent discrimination.

The use of this defense has been the subject of much debate as a result of conflicting decisions throughout the federal court system. However, in a long-awaited decision, the U.S. Supreme Court ruled on January 23, 1995 that a terminated employee's claim to discrimination is *not barred* by the employer's later discovery that the employee engaged in misconduct which would have justified termination had the employer known it. However, the Court also ruled that this after-acquired evidence may serve to bar the employee from recovering back pay after the employer's discovery of the misconduct.

In *McKennon v. Nashville Banner Publishing Co.*, No. 93-1543, 1995 WL 20463 (U.S. Jan. 23, 1995), Christine McKennon, age 62, alleged that her layoff was due to age discrimination. During discovery, the Banner learned that in her final year of employment McKennon had taken home and copied several confidential documents, a violation of company policy for which she could have been terminated had the company known. The trial court granted the Banner's motion for summary judgment, holding that her misconduct was grounds for termination, and that neither back pay nor any other remedy was available to her. The Sixth Circuit Court of Appeals affirmed, and McKennon was granted review by the Supreme Court.

The Supreme Court reversed. In a unanimous decision, the Court explained that allowing after-acquired evidence completely to bar a claim of discrimination would undercut the public policy to eradicate workplace discrimination. Accordingly, the Court ruled that claims such as McKennon's are not to be dismissed in response to after-acquired evidence.

However, according to the Court, such evidence is not irrelevant. The Court recognized that after-acquired evidence generally should preclude reinstatement of the terminated employee or the recovery of front pay. Furthermore, the employee's claim for back pay will end with the discovery of the after-acquired evidence. For example, an employee who is terminated on January 1, files suit on March 1, and whose pre-termination misconduct is discovered on April 1 will be able to recover back pay, if at all, only for the period of January 1 to April 1, even if the trial occurs months or, more likely, years later. Needless to say, while this ruling serves to restrict an employer's ability to get these cases dismissed, it remains a viable means of substantially reducing liability in these lawsuits.

VI. CONCLUSION

Large corporations, who are the primary targets of the recent startling increase in state tort and retaliation cases, point out that if the law is not changed, anyone who somehow fits within one of the growing exceptions to the employment at will doctrine will be guaranteed continued employment regardless of his or her actual performance on the job. Employers will not be able to take the risk that a legitimate, well-deserved termination will be misconstrued by a jury. And even with respect to those employers who eventually prevail on these claims, victory may not be so sweet. Litigation costs have soared.

With the recent huge verdicts, plaintiff's attorneys see these cases as a goldmine, and their clients see them as better than winning the lottery. Plaintiff's attorneys are now willing to spend so much money during the pre-trial phase -- scheduling twenty to thirty depositions, filing six sets of document production requests -- that litigation costs, even where the case can be dismissed via summary judgment, can be enormous. Trials, which used to last an afternoon, now stretch on for several weeks. Employers are often forced to retain expensive psychological and economic expert witnesses, whose fees can easily exceed $10,000 apiece, depending upon the length of the trial, the nature of the case, and the witness' level of expertise. Total trial expenses exceeding $100,000 are not unusual.

Therefore, even though the employment at-will doctrine technically exists in most states, the prudent employer will review all discharge decisions with the utmost of care. Decisions to terminate an employee should be reviewed not only on a legal/technical basis to insure compliance with the law, but they should also be reviewed on an equity/fairness basis. After the employer has determined that the termination decision fully complies with the law, it should take the proverbial "ten steps back" to review the decision from the vantage point of an outsider. In fact, someone not emotionally involved should review all termination decisions to insure that the employer is in the best possible posture to defend the potential employment discrimination suit.

WRONGFUL DISCHARGE AND OTHER WORKPLACE TORTS: TRENDS, TRIALS, AND TRIBULATIONS

I. INTRODUCTION

Workplace torts are, in many ways, a new breed of lawsuit- one that can be vastly different from the traditional statutory claim. Because the common law of torts involve mostly "judge-made" principles of law, there are few statutes and regulations to read. Employers must instead examine case histories for hints on how to best protect themselves. Compounding the dilemma is the fact that workplace tort claims may carry the possibility of unlimited punitive or pain and suffering damages. Psychological issues, which may be of only marginal relevance in a statutory case, take on new importance in workplace tort cases. Employers today are routinely facing the specter of jury awards totaling hundreds of thousands and sometimes millions of dollars in damages. An employer of the 90's must be prepared to deal with and respond to these trends, trials and tribulations.

These materials will discuss the recent developments in wrongful discharge litigation and the most significant tort claims that are now being added to wrongful discharge claims. Plaintiff's attorneys are using tort claims in order to get jury review of termination decisions and to get punitive damages. Recently, the tort claims used with the most success by plaintiff attorneys include defamation, fraud, negligence, and invasion of privacy claims. These tort claims and the maneuvers that can be used by employers to successfully defend these claims will be discussed, as well as how damage issues can be handled prior to a lawsuit and during a lawsuit. Finally, some recent decisions regarding insurance coverage for employment lawsuits will be discussed.

II. EMPLOYMENT-AT-WILL

Almost every jurisdiction in the United States follows the doctrine known as "employment-at-will" which means that an employer may discharge an employee without restriction for any reason or no reason, good cause or no cause, without incurring any liability to the employee. However, there are **numerous** exceptions to this rule, and courts and juries have been willing to find exceptions, especially in circumstances where they feel that the employer has misrepresented the nature of the plaintiff's employment security or where the employee has been treated unfairly.[2]

A. Recent Developments In The Law Of Employment-At-Will

1. Constructive Discharge - The Employee Quits And Now He's Suing You Saying That You Made Him Quit

Constructive discharge can be characterized as a situation where the employee resigns rather than continuing to tolerate unreasonable conditions imposed by the employer. Standing alone, constructive discharge is not a cause of action, but rather a doctrine which transforms what is ostensibly a resignation into a firing which can lead to a claim for a breach of contract or a tort.

a) Elements Of A Constructive Discharge Claim

Most jurisdictions define constructive discharge as follows:

1. The employer deliberately created or maintained the intolerable working conditions;

2. The employer had the intention of forcing the employee to leave the employment; and

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[2] The three general exceptions to the employment-at-will doctrine are:

  1. Wrongful termination in violation of public policy;

  2. Wrongful termination in violation of an oral, expressed, or implied contract; and

  3. Wrongful termination in violation of an implied covenant of good faith and fair dealing.

3. That the employee left the employment because of the working conditions.

b) Significant Victory For California Employers

In a significant victory for employers, the California Supreme Court deviated from the past line of cases where constructive discharge could be proved by showing that the employer had some knowledge of intolerable conditions. In the recent case of *Turner v. Anheuser-Busch, Inc.*, 1994 WL 388302 (Cal. July 25, 1994), the Court held that in order to establish constructive discharge, an employee must prove by a preponderance of the evidence that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. The Court held that it was not enough that an employer had some sort of knowledge that there were intolerable conditions, rather the employer must have had the intent to create it or knowingly allowed the conditions to exist. Further, the Court held that this knowledge may have existed on the part of the employer or those who represent the employer such as officers, directors, managing agents, and even supervisory employees.

c) Radical Demotions Or Paycuts Can Be the Basis For Constructive Discharge

While a demotion will generally not be the basis for a claim of constructive discharge, radical demotions or actions affecting job security can give way to a constructive discharge claim. For example, in *Wilson v. Monarch Paper Co.*, 939 F.2d 1138 (5th Cir. 1991), the Court held that the Company's stripping a senior executive of his duties and assigning him to clean a warehouse was extreme conduct, constituting intentional infliction of emotional distress and amounting to constructive discharge. Also, threatening to significantly reduce an employee's pay without a valid reason may also lead to a constructive discharge suit. *Nielsen v. Revcor, Inc.*, 770 F.Supp. 404 (N.D.Ill 1991).

B. The Inadvertent Altering Of The Employment-At-Will Relationship

In most jurisdictions, the employment relationship is considered an "at-will" relationship unless the parties alter it to provide termination only for just cause. Employers sometimes knowingly alter the relationship by individual contracts with employees, but recent case law shows how the relationship can be altered inadvertently.

1. Oral Assurances During An Interview

Oral assurances of job security during a pre-employment interview can alter the relationship. For example, an employee proved the existence of an agreement where he could only be discharged for just cause mainly on oral assurances given to him during pre-employment interviews with several representatives of the employer. *Barnell v. Taubman Co.*, 203 Mich. App. 110, 512 N.W.2d 13 (Mich. App. 1993) *appeal denied, stay denied*, 445 Mich. 931 (1994). During the pre-employment interview, the employee expressed concern about job security and the representatives gave him assurances that there was job security and that he would have a job in the future. The employee was subsequently laid off. The court found that the employee had reasonably relied on the assurances during the interview and that the employer representatives had made a promise forbidding termination absent just cause.

2. Ambiguous Letters To Employees Trying To Improve Morale

An ambiguous letter sent to employees in order to improve morale which stated that the company would do everything it could to avoid lay-offs and to minimize job losses was enough to change the employment-at-will relationship to termination only for just cause. The court was most swayed by the statement in the letter that said "This does not mean that firings for good reason, such as poor performance or unsafe work, will not occur." *See Lesmeister v. American Colloid Co.*, 4 F.3d 631, 632 (8th Cir. 1993), *reh'g, en banc, denied*, 1993 U.S. App. LEXIS 29679 (1993).

3. Non-Enforcement Of A Policy Leads To An Implied Agreement Not To Fire An Employee For Violation Of The Policy

In *Goodyear Tire and Rubber Co. v. Portilla*, 1994 W.L. 278109 (Tex. June 22, 1994), the Texas Supreme Court recognized something new in Texas -- an implied modification of the at-will relationship. In this case, Goodyear Tire and Rubber Co. had an anti-nepotism policy. However, it knowingly failed to enforce the policy for seventeen years with respect to a certain long-term employee. After seventeen years without taking any action to enforce the policy, Goodyear Tire and Rubber Co. decided to enforce the policy and gave the employee an ultimatum: either transfer to another store or be fired. The employee sued Goodyear for violation of her employment contract. The Texas Supreme Court held that Goodyear Tire and Rubber Co.'s failure to enforce its anti-nepotism policy with respect to an employee meant that it could not discharge the employee for violation of the anti-nepotism policy.

4. Personnel Manuals

Generally, the courts have continued to follow the general rule that at-will employees cannot infer a contract rising out of an employer's personnel manual, especially when the personnel manual contains a **specific disclaimer** provision. General statements about working conditions, disciplinary procedures, or termination rights are not sufficient to change the at-will employment relationship.

However, at least one court has held that a handbook provision that specifically and expressly curtails the employer's right to terminate the employee **for some specific action** may modify the employment-at-will relationship. In *Vida v. El Paso Employees' Federal Credit Union*, 1994 W.L. 262578 (Tex. App.-El Paso, June 16, 1994), the court found that a provision that expressly promised that "no employee would be penalized for using the grievance procedure" limited the employer's right to terminate employees for using the grievance procedure. The court held that, although the at-will doctrine still governed the relationship generally, there was no at-will relationship with respect to an employer's ability to terminate an employee for using the grievance procedure.

Further, there is disagreement among the courts as to whether a progressive discipline system establishes a contract to terminate only for just cause. However, a number of recent higher court decisions suggest that a progressive discipline system alone is not enough to modify the at-will relationship. The Ninth Circuit Court of Appeals recently held that a progressive discipline system is insufficient to establish an implied contract to terminate only for just cause. *Brooks v. Hilton Casinos, Inc.*, 959 F.2d 757 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 300 (1992).

III. WORKPLACE TORTS TAKE ON SIGNIFICANCE IN TERMINATION CASES

With increasing frequency, wrongful discharge suits are accompanied by tort claims. Plaintiff attorneys are adding these claims because they provide additional grounds if the wrongful discharge claim is knocked out at an early stage and because they allow punitive damages. These tort claims pose a serious threat of increased liability and employers need to be aware of the bases for such actions and how to avoid them. What follows is a discussion of the tort claims most recently responsible for raising the collective eyebrows of defense attorneys.

A. Defamation Claims

Talk is no longer cheap, at least in the workplace, where defamation suits can result in million dollar liabilities/judgments for employers.

Defamation is generally defined as a false and defamatory statement about the plaintiff that is communicated or published to a third person and causes damage to a plaintiff's reputation.

1. Required Elements To Prove Defamation

a) There Must Be A Defamatory Statement About The Plaintiff

Accusations that an employee has stolen something are the most common statements that give rise to defamation claims in the employment context.

b) Publication

It is essential to a defamation action that the allegedly false statement be heard or read by a third person and that the third person understand the statement to be defamatory. In the employment setting, two issues are important: whether statements made among company supervisory personnel are considered published and whether company statements which the plaintiff subsequently repeats to others are considered published.

(1) Intracorporate Communications

There is a split in the courts regarding whether statements made among corporate persons who have a reason to know is a publication. In *Kurtz v. Williams,* 188 Ga. App. 14, 371 S.E.2d 878 (Ga. App. 1980), the court recognized the "legal fiction that no publication occurs in a intracorporate communication to one who has a duty or authority to receive the information." However, the majority view is that statements made to or among management generally are "published." However, the corporation may have a defense of a qualified privilege.

(2) Compelled Self Publication

If an employer or supervisor says something to an employee while the employee is alone, then there is generally not a publication even if the plaintiff repeats it to others. However, the courts recognize an exception generally known as "compelled self publication." Under this exception, if it is foreseeable that the defamed party will be required to repeat the defamatory statement, then there is a publication. For example, in *Lewis v. Equitable Life Assurance Society,* 389 N.W.2d 876 (Minn. 1986), the employer gave employees false reasons for their termination and the employees had to repeat those reasons to prospective employers when they were seeking new jobs. The court held that there was a publication because the plaintiffs were forced to repeat the defamatory statements.

2. Successful Strategies And Defenses To Defamation

a) Absolute Privilege

Some statements are absolutely privileged even if they are false. For example, statements in judicial proceedings are absolutely privileged. Further, at least in one state, an employee cannot sue for oral or written statements made to the state Unemployment Commission concerning the reasons for employee discharge, even if those statements were made with malice and/or were false. *See* Tex. Lab. Code Ann. § 202.071 (1994).

b) Qualified Privilege

Statements which are made in good faith regarding a subject in which the person communicating has an interest or duty, and where the communication is made to one who has a legitimate interest in knowing the information, are considered qualifiedly privileged. However, this privilege generally only extends to those persons possessing a legitimate interest in the information. For example, in *Stockstill v. Shell Oil Co.,* 3 F.3d 868 (5th Cir. 1993), *cert. denied,* 114 S. Ct. 1307 (1994), the court held that an employer who told an EEOC investigator about the inappropriate sexual conduct of an employee of an independent contractor whom the employer used for projects was not liable for slander or defamation. The court held that the statements were qualifiedly privileged since Shell had a duty to disclose the information to the EEOC and the EEOC had a legitimate interest in the information.

(1) Investigations Of Employee Misconduct

Generally, statements made as a part of an investigation of employee misconduct to other supervisory personnel who have a legitimate reason to know are qualifiedly privileged. *See Ghebreselassie v. Coleman Sec. Service,* 829 F.2d 892 (9th Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988). However, this privilege can be lost if the statements are made to people who do not have a legitimate reason to know, the statement is made with malice, or the statement is made when the employer knows or should know it is false.

(2) Job References

Generally, an employer will not be liable for defamation if it makes true statements to a prospective employer about the former employee's performance.

(3) Announcements To Other Employees

Generally, the traditional rule is that an employer has a qualified privilege to tell other employees that an employee was terminated for misconduct, either to emphasize to them what sort of behavior the employer expects or to announce the end of the incident. *See Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374 (Minn. 1990). However, this is risky and an employer who goes overboard can be liable for communicating information to other employees.

c) The Truth Of A Statement Is An Absolute Defense

Truth is the best defense but, of course, it can only be used to the extent the evidence permits it.

d) Consent

An employee's consent to the publication is another defense. For example, an employee consents to a publication where he executes a release authorizing the communication of his work record.

B. Fraud Claims

In today's competitive business environment, companies often paint a rosy picture of their company and what they will offer to prospective employees. However, when corporate promises or assurances are not true or turn for the worse, they often lead to the tort of fraudulent misrepresentation. In order to prove fraudulent misrepresentation, an employee generally must prove the following:

- A material misrepresentation of an existing fact;
- Falsity of that representation;
- Knowledge of the falsity;
- Deception; and
- An identifiable injury.

1. False Statements To Allure Employees

Courts have been willing to uphold fraudulent misrepresentation claims where an employee was induced to change his mind or (after accepting a position with a competitor) remained with the defendant employer because of a false misrepresentation. For example, in one case, an employer convinced an employee to stay while the employer was conducting a search for his replacement but actually only wanted to keep him until a replacement could be hired. *See Shebar v. Sanyo Business Systems Corp..*, 111 N.J. 276, 544 A.2d 377 (N.J. 1988). Further, some courts have been willing to find fraudulent misrepresentation claims where a defendant has promised to employ an employee for a certain minimum of years while, at that time, the defendant really had no intention of employing that person for that period. *Shaitelman v. Phoenix Mut. Life Ins. Co.*, 517 F.Supp. 21 (S.D.N.Y. 1980). Other courts have imposed a duty on employers to make full disclosure of all of the facts regarding the business where disclosure is necessary to avoid creating any misleading impression by only a partial revelation of the facts.

Employers must be careful during interviews about what they say about the nature and the extent of their business and its profitability. For example, a plaintiff won a fraudulent misrepresentation case where he relocated upon receiving assurances during an interview that the employer was profitable (when, in fact, the company had lost money for two straight years) and the employee was laid off seven months later. *See Harlan v. Intergy, Inc.*, 721 F.Supp. 148 (N.D. Ohio 1989).

C. Negligence Theories

Negligence claims are on the rise. These claims have a much higher probability of success since a plaintiff does not have to prove intent on the part of the defendant. Typical negligence claims include negligent misrepresentations, negligent performance appraisals, and negligent hiring or retention.

1. Negligent Misrepresentation

Under the doctrine of fraudulent misrepresentation, the plaintiff must prove that the employer intentionally misrepresented an existing fact. In contrast, an employer can be liable for negligently misrepresenting something or giving false information. For example, a laid-off engineer stated a claim for negligent misrepresentation where the employer stated that the work was available for her to do in the event that the defense project for which she was hired was unsuccessful. At that time, however, the employer knew there was a good chance that the engineer's job would be eliminated because of cutbacks. *See Pearson v. Simmonds Precision Products, Inc.*, 160 Vt. 168, 624 A.2d 1134 (Vt. 1993).

2. Negligent Performance Appraisal

A private employer does not have any duty to evaluate employees' performances during the course of employment. However, if an employer chooses to do so, it must do so in a careful and consistent manner since a subsequent termination may result in a negligent performance appraisal claim. This claim is relatively new and has found little support outside the state of Michigan. Since Michigan, along with California, is considered to be a bellweather state, the Michigan case law may have some predictive value in other states. Therefore, an employer is advised to have performance appraisal procedures in place and to follow its own rules.

3. Negligent Hiring or Retention

This type of tort may come up when an employer knew or should have known about dangerous propensities of employees or applicants. For example, an employee who was repeatedly raped by her supervisor over a period of years and forced to resign stated a claim for negligent retention where the employer knew or should have know of the rapes yet continued to employ this supervisor. *Perkins v. Spivey,* 911 F.2d 22 (8th Cir. 1990), *cert. denied* 499 U.S. 920 (1991). At least one court has extended the negligent hiring theory to volunteers. In *Doe v. Boys Clubs Of Greater Dallas, Inc.*, 868 S.W.2d 942 (Tex. App.-Amarillo 1994), the court, at least in *dicta*, agreed that the defendant could be liable for negligent acceptance of a volunteer, in the same fashion that an employer may be liable for negligent hiring of an employee.

D. Privacy Claims

Courts recognize a common law cause of action for invasion of privacy in the workplace setting. Generally, there are four tort causes of action which plaintiff's attorneys have found to be successful in the employment setting. They are:

- Appropriation of one's name or likeness;
- Unreasonable intrusion upon the solitude or seclusion of another;
- Publicity or disclosure that unreasonably places the person in a false light; and
- Unreasonable publication or disclosure of private facts about another.

Further, a number of states, including Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington, recognize certain constitutional rights of privacy without the necessity of a tort. Plaintiff's attorneys attempt to use such claims in their lawsuits against employers for several reasons. One of the most important reasons is that it is not as difficult to prove as the other tort actions. For example, in defamation, a plaintiff has to prove that the statements against the plaintiff employee were not truthful. However, truth is not a defense to invasion of privacy. Further, these types of cases are particularly sympathetic to juries when the employer appears to overstep its right to look into an employee's private belongings and even the employee's private life.

1. Types Of Claims

a) Unreasonable Intrusion Upon The Employee's Physical Solitude Or Seclusion

This occurs when the employer or one of the employer's representatives intentionally intrudes, physically or otherwise, upon the solitude or private affairs of the employee where it would be highly offensive to a reasonable person.

Examples of unreasonable intrusion:

- Repetitive inquiries with respect to private matters of no relevance to an employee's employment can provide a sufficient basis for an invasion of privacy cause of action against the employer. *See Phillips v. Smalley Maintenance Services, Inc.*, 711 F.2d 1524 (11th Cir. 1983).

- Where a supervisor places listening devices in the office of an employee who is accused of wrongdoing. *Slack v. Kanawha County Housing Auth.*, 188 W.Va. 144, 423 S.E.2d 547 (W.Va. 1992).

- Opening and reading the employee's private mail even though the mail had been sent to the employee's work place. *Vernars v. Young*, 539 F.2d 966 (3rd Cir. 1976).

b) Claims Of Unreasonable Appropriation Of A Name Or Likeness

This is a relatively rare case, but it does come up when an employer uses an employee's name or photograph to promote the employer's business without the employee's consent.

c) Claims Of Unreasonable Public Disclosure Of Private Facts

If an employer publicly talks about the private life of his employee such that it would be offensive to the employee and is not of legitimate concern to the persons to whom the employer is talking, the employer may be liable for unreasonable public disclosure of private facts. However, in order to be actionable, the employer must communicate it to the public at large. For example, generally there is no public disclosure where the employer makes statements to a small group such as a staff meeting, *Wells v. Thomas*, 569 F.Supp. 426 (E.D. Pa. 1983), or where the grounds of an employee's termination are discussed only with the company's management, *Wilhite v. H.E. Butt. Co.*, 812 S.W.2d 1 (Tex. App.-Corpus Christi 1991). This claim may come up where the employer disseminates an employee's medical or psychiatric records.

d) Claims Of Placing The Employee In An Unfavorable Light Before The Public

This claim arises where the employer gives widespread unfavorable publicity to the employee. Truth is not a defense.

e) Strategies To Avoid Invasion Of Privacy Claims

- The employer should take special precautions to hold in confidence information regarding employee drug use or medical conditions.
- The employer or any of his/her employees should be careful about what types of questions they ask about an employee's personal life.
- An employer should use the "need to know standard" when discussing matters of personal information about employees.
- An employer may have defenses of qualified or absolute privilege depending on to whom the information was disseminated.

IV. DAMAGES

A. Discovery Issues

1. Mental Examination And Psychological History Of The Plaintiff

Some workplace tort claims may involve allegations of psychological damage to the plaintiff. This type of claim can open strange discovery issues. Should an employer be entitled to an independent evaluation of the mental condition of the plaintiff? Discovery of mental examinations and psychological history of an alleged harassment victim has not generally been allowed in a pure Title VII cases. For example, in *Robinson v. Jacksonville Shipyards. Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), a federal court in Florida held, in an hostile environment case, that the plaintiff's mental condition was not in controversy because both a liability determination and a back pay entitlement were predicated on an objective standard. But the standard in certain state tort cases may well be different. Even where no emotional distress claim is raised, such information may be relevant to defenses regarding the character of the plaintiff. Thus, in *Vermett v. Hough,* 627 F. Supp. 587 (W.D. Mich. 1986), the court found for the employer, in part, because the plaintiff's journal and the defendant's psychiatric expert testimony showed the plaintiff to be a woman "pre-disposed to interpret her experiences as sexual harassment." Similarly, in *Collins v. Pfizer Inc.*, 1985 WL 56689 (D. Conn. 1985), the testimony of a psychologist expert, as well as evidence of past psychiatric problems, caused the court "considerable hesitation" in accepting the plaintiff's testimony and was a factor in the denial of her claim.

The court may also permit mental or psychiatric examinations where the plaintiff puts his or her emotional or mental state in issue. For example, in *Lowe v. Philadelphia Newspapers, Inc.*, 101 F.R.D. 296 (E.D. Pa. 1983), the deposition of the plaintiff's treating psychiatrist and an examination by the defendant's psychiatric expert were permitted. In *Ryzlak v. McNeil Pharmaceutical Co.*, 38 Fed. R. Serv. 2d 443, 444 (E.D. Pa. 1982), the defendant was entitled to two 90-minute psychological examinations. *See also Vinson v. Superior Court (Peralta Community College District)*, 43 Cal. 3d 833, 740 P.2d 404 (Cal. 1987). But the courts are not in complete accord. In *Broderick v. Shad*, 117 F.R.D. 306 (D.D.C. 1987), the employer was denied access to the plaintiff's medical record, but only on her sworn statement that she did not seek medical treatment for the "severe psychological stress" alleged in her complaint.

In some cases, courts have allowed a mental examination of the plaintiff but have imposed stringent safeguards against harassment or undue invasion of privacy. For example, in one case, the plaintiffs were entitled, at their option, to the presence of a third party including counsel or a recording device at psychiatric interviews. *Zabkowicz v. West Bend Co.*, 585 F. Supp. 635 (E.D. Wis. 1984). In another case, the plaintiff was allowed to bring her own medical expert to observe. *Lowe v. Philadelphia Newspapers, Inc.*, 101 F.R.D. 296 (E.D. Pa. 1983). Similarly, in *Vinson v. Superior Court of Alameda County, supra*, the plaintiff was allowed to record the examination on audio tape. In *Lowe* and *Vinson*, however, the plaintiff's attorney was not permitted to attend the medical examination.

2. What Is Discoverable About The Alleged Tort-Feasor?

Most workplace torts involve an individual tort-feasor. The question then arises as to the discovery permitted concerning the supervisor who is accused of misconduct. On-duty misconduct involving other employees may well be relevant to the issue of punitive damages, even if not immediately related to the case at hand. For instance, in *E.E.O.C. v. General Motors Corp.*, 48 Fair Empl. Prac. Cas. (BNA) 1285, 50 Empl. Prac. Dec. P 39,117 (D. Kan. 1988), the court upheld a Magistrate's Order compelling GM to supply information regarding employee complaints unrelated to the present action. Plaintiffs were allowed to discover the supervisor's personnel file, all documents relating to any pre-employment investigation and interview of the supervisor, as well as all of the supervisor's performance evaluations. In *Broderick v. Shad, supra*, 117, the plaintiff who alleged favoritism and the creation of a hostile environment was entitled to discovery as to sexual liaisons between the supervisor and another female employee, as well as documents regarding promotions, awards, appraisals and transfers of non-party personnel.

B. Psychological Damages

In most jurisdictions, psychological damages are referred to as mental anguish damages. Mental anguish is usually defined as "heightened emotional injury beyond ordinary grief, high degree of mental suffering, or intense pain of mind and body." In order to prove mental anguish, plaintiffs use a variety of techniques. Each of these techniques are very appealing to a jury. An employer must be ready to respond to them. Plaintiff's counsel will generally provide the following methods of proof in a trial in order to prove psychological damages:

- The plaintiff will testify regarding how his/her termination or the tort, such as defamation, affected his/her mental state and his/her ability to carry on with the rest of his/her life. The plaintiff may testify that he/she was depressed, cried all of the time, had trouble with his/her marriage, and/or had trouble with his/her sex life.

- Plaintiff may present his/her family and friends to testify about his/her mental state, whether he/she appeared depressed, whether he/she was willing to go to parties, etc.

- Plaintiffs may present expert testimony such as treating psychiatrist.

In preparing for litigation, employers should accumulate proof to the effect that the plaintiff was not really psychologically injured. If, for example, the conduct which caused the plaintiff to quit or be fired occurred prior to her actual resignation or firing, witnesses should be interviewed as to what the plaintiff's mental state was before she actually left employment. Further, if possible, it might be necessary to talk to witnesses who saw the plaintiff on a social occasion after the tort or the wrongful termination occurred.

The employer may also want to find out if the plaintiff had any other types of psychological history prior to the alleged tort or wrongful termination which may be the cause of any psychological problems. It is also permissible to raise an issue of causation. For example, if the employee has experienced other life stressors in recent times, these stressors may raise the possibility that any psychological stress experienced was caused by other than workplace factors.

C. Punitive Damages

With all workplace torts, there is a significant chance of punitive damages. Punitive damages awards in such cases as defamation and invasion of privacy have been astronomically high in recent years. All jurisdictions in which punitive damages are allowed permit their recoveries and actions based upon a tort claim if the conduct of the defendant is found to be sufficiently aggravated.

Generally, in all jurisdictions, punitive damages focus attention on the conduct of the defendant and not necessarily on the extent of the harm sustained by the plaintiff. To sustain punitive damages, the jury must be satisfied that there was some sort of spite, malice, or an evil motive on the part of the defendant, or even a conscious or deliberate disregard of the interest of others. In most jurisdictions, punitive damages are also used in order to punish or deter defendants for their intentional actions or wanton and reckless disregard for the rights of others.

D. Methods For Reducing The Potential For Punitive Damages In Lawsuits

Employers are generally vicariously liable for the acts of their managers and supervisors within the scope of their duties. This is known as the doctrine of "respondeat superior." Generally, the doctrine of respondeat superior may be used to impose punitive damages upon an employer if:

- The employer actually authorized the act which is the focus of punitive damages; or
- The supervisor or managerial employee was unfit and the employer was reckless in employing him or her; or
- The agent was employed in a managerial or executive capacity and was acting in the scope of employment; or
- The employer or a high level employee of the employer actually ratified or approved the act.

In litigating claims involving punitive damages, the plaintiff will attempt to show that the employer actually did something wrong or one of its agents actually did something wrong and the employer knew about it or didn't care about it. There are ways, however, of reducing the amount of punitive damages and reducing the chance that punitive damages may even be awarded by taking several precautionary steps.

1. Pick Your Managers/Supervisors Carefully and Clearly Delineate In Writing And Orally The Scope Of Their Authority.

In a number of jurisdictions, the employer will be liable if it authorizes the act of the supervisor or manager. Very few employers actually authorize their agents to engage in acts which are intentionally malicious or which would result in such claims as defamation. However, under the common law, the employer is liable if he actually gives the employee authority to act and to make decisions and that employee uses that authority to hurt another employee. While it is easier said than done, employers should thoroughly investigate their high level employees. Is he or she the type of person who might do something malicious to others? Further, employers should clearly identify the authority that supervisors have orally and in written form such that, if they ever do anything that exceeds their authority, the employer has proof that it never authorized their actions and should not be liable. For example, in one case, a court held that the employer should not be liable for punitive damages where a supervisor acted outside the scope of his authority in sexually harassing a subordinate. *Salley v. Petrolane, Inc.*, 764 F.Supp. 61 (W.D.N.C. 1991).

2. Investigate, To The Extent Permitted By Law, Your Employee's Background

Punitive damages in a negligent hiring or negligent retention case occur where an employer hires a person who engages in an act which hurts another employee if such conduct could have been reasonably anticipated or where an employer retains someone whom he knew was troublemaker or would cause problems and took no action. For example, in *K-Mart Corp. v. Martinez*, 761 S.W.2d 522 (Tex. App.-Corpus Christi 1988), *writ denied* (May 10, 1989), the employee, a high level manager, slandered, assaulted, and falsely imprisoned other employees. The jury awarded punitive damages against the employer for negligently hiring the manager.

3. Train Your Managers And Supervisors

Many torts such as defamation and invasion of privacy can be avoided if the supervisors/managers and other high level employees are adequately counseled and trained on these issues. These employees need to know the risks involved and what to do in order to avoid landing your company in a legal minefield.

4. Investigate Workplace Allegations Of Improper Conduct And Take Prompt Remedial Action

Punitive damages in many jurisdictions are used to deter future bad conduct. Generally, in order for the employer to be liable, the plaintiff will have to prove either that the employer knew about the wrongful act or that the employer actually ratified the act. In a majority of cases, the employer won't actually know about a wrongful act until after the fact. However, as soon as the employer is put on notice of possible wrongdoing, it should promptly investigate and take remedial action as appropriate. It is extremely important that internal investigations be conducted properly. There are certain procedures and training programs which will help ensure that the employees entrusted with investigatory responsibility perform this function properly. Once a determination as to the investigated conduct is made, appropriate action must be taken to make sure that an improper activity does not again occur and that any detrimental impact of the improper activity is mitigated to the extent possible. There should be no exceptions to the policy for favored managers or supervisors. It is very important to come across to the jury that you are a fair employer and that punitive damages are not needed to deter you from allowing managers to commit future torts in the workplace.

5. No Matter How Happy You Are To Get Rid Of An Employee, Treat The Employee Fairly And Courteously Before And During His/Her Termination Of Employment

For the most part, juries are made up of employees rather than employers. They are influenced by how employers treat their employees. In order to reduce the risk or the amount of punitive damages, it is imperative that you appear fair and reasonable. Treat the employee politely and courteously no matter how happy you are to see him/her leave. Follow the standard procedure for terminating employees and do not deviate. Do not reprimand the employee or discuss his/her termination in front of other employees and do allow the employee to leave the premises with dignity.

V. DEFENSES TO WRONGFUL DISCHARGE AND WORKPLACE TORTS

A. NLRA Pre-Emption

Whenever an employee brings a state law cause of action and the employee is covered by a collective bargaining agreement, the employer should consider whether to assert a Section 301 pre-emption defense. Section 301 refers to Section 301 of the Labor Management Relations Act which gives employees the right to sue their employer for breach of the collective bargaining agreement. There are no punitive damage liabilities and the claim will be decided in accordance with a specialized body of federal common law by a federal judge.

However, Section 301 will not pre-empt misrepresentation claims arising from a company's failure to live up to promises of long term employment during pre-employment job interviews according to the Iowa Supreme Court. *See Barske v. Rockwell International Corp.*, 514 N.W.2d 917 (Iowa 1994). Most federal decisions finding state law tort claims pre-empted by Section 301 involve conduct by the employer while the employees were covered by the collective bargaining agreement. In contrast, when misrepresentations are made prior to employment, employees were not covered by a collective bargaining agreement and federal courts have found no pre-emption.

B. Grievance Or Disciplinary Procedures

If an employee is subject to a collective bargaining agreement, he or she must generally go through the grievance and arbitration procedure in the agreement before instituting a state law suit.

In non-union settings some states have precluded employee's wrongful discharge claims and tort claims if an employer has an internal dispute resolution mechanism and the employee fails to use it before instituting suit. However, even if there is an internal dispute resolution mechanism, the courts will not bar an employee's wrongful discharge or tort claim if the court determines that the grievance procedure did not comport with elementary standards of fairness. *See Renny v. Port Huron Hospital*, 427 Mich. 415, 398 N.W.2d 327 (Mich. 1986), *reh'g denied*, 428 Mich. 1206 (1987).

C. Disclaimers

Disclaimers such that the employment is only at-will should be included in all employment applications, company manuals and benefit plan documents. While the requirements vary depending on the jurisdiction, generally the disclaimer should be very clear and conspicuously placed and the employee should sign and acknowledge that they have read and understand the disclaimer.

D. Workers' Compensation Exclusivity

Employers should also consider the workers' compensation exclusivity doctrine. Under this doctrine, employees who are injured in the course and scope of employment are only entitled to the remedies offered under the workers' compensation statute. However, some states, including Texas, allow employers to self-insure and these self-insured employers do not have recourse to the exclusivity doctrine. State workers' compensation statutes typically provide that an employee's remedies under the statute for a covered injury are exclusive of all other remedies that an employee might have against the employer. Employers have scored significant victories in the courtroom recently on the exclusivity doctrine to bar emotional distress claims. However, a number of jurisdictions will still not bar such claims, especially if the employer actually knew of intentional conduct which harmed the plaintiff and did nothing about it.

1. Workers' Compensation Exclusivity For Emotional Distress Claims?

The courts formerly distinguished between cases involving pure emotional distress and cases involving emotional distress accompanying a physical injury in order to determine whether the exclusive remedy doctrine applied. If an emotional distress injury was ancillary to a physical injury, the exclusivity defense would apply. However, if there was only emotional distress without any physical injury, then the workers' compensation exclusivity doctrine would not apply. A number of recent decisions show a trend towards exclusivity for emotional distress claims. For example, in *Censullo v. Brenka Video, Inc.*, 989 F.2d 40 (1st Cir. 1993), the court held that an employee could not sue his employer for intentional infliction of emotional distress because emotional distress is a personal injury arising out of the employment relationship. Similarly, in *Juarez v. Ameritech Mobile Communications. Inc.* 957 F.2d 317 (7th Cir. 1992), the court held that workers' compensation bars intentional infliction of emotional distress based on allegations of sexual harassment because such an injury is a risk inherent in the employment relationship.

2. Recurring Problems In the Workers' Compensation Exclusivity Defense

A number of states still apply the physical/mental injury distinction and will not bar a plaintiff's intentional infliction of emotional distress claim if there is no physical injury. Further, even if the courts do not use the distinction, employers who actually know about the conduct that caused the plaintiff's injury (such as knowledge of sexual harassment) and did not take any action to stop the conduct are not able to rely on this defense. *Cline v. General Elec. Capital Auto Lease, Inc.*, 757 F.Supp. 923 (N.D. Ill. 1991).

VI. INSURANCE COVERAGE FOR EMPLOYMENT DISPUTES

In the initial stage of a claim or a lawsuit, it is worthwhile to evaluate whether the employment related claim may be covered under an insurance policy where the insurer would have a duty either to defend or indemnify the employer. Generally, most courts have held that commercial general liability (CGL) agreements do not cover claims for wrongful termination and other intentional torts. The courts have based their decisions on the nature of insurance policies. Insurance is designed, generally, to protect against contingent events, not those events which are relatively certain. Moreover, there is a strong public policy that people who intentionally do bad things should be held personally responsible.

However, newer agreements have broadened the scope of coverage in recent years and the courts have begun to break down the barriers and impose coverage responsibility on reluctant carriers for certain claims.

A. Recent Case Law

1. Coverage For Torts Sounding In Negligence

Generally, claims based on alleged negligent conduct by the employer, such as negligent infliction of emotional distress or negligent hiring, come closest to covered events and employers have had the most success in getting coverage for these torts. For example, in *United Pacific Ins. Co. v. First Interstate Bancsystems of Montana*, 664 F.Supp. 1390 (D. Mont. 1987), the court found that a wrongful termination claim was not excluded by the insurance contract's intentional harm exclusion because the complaint alleged that the employer acted negligently in terminating the employee and negligent termination is a distinct cause of action in Montana. However, other courts have denied coverage, even if the complaint does have negligent claims, if the genesis of the alleged tort was the termination of employment, an intentional act.

2. Grounds For Negligent Torts Closely Intertwined With Intentional Tort

Recently, the California Supreme Court recognized that, where a complaint contains allegations of intentional conduct, the carrier may owe a duty to defend if the complaint also alleges negligent conduct occurring in "close temporal and spatial proximity" to the intentional conduct as to "compel the conclusion that they are inseparable for purposes of determining whether [the carrier] owed a duty to defend."

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Horace Mann Ins. Co. v. Barbara B., 4 Cal. 4th 1076, 17 Cal. Rptr. 2d 210, 846 P.2d 792 (Cal. 1993), *reh'g denied*, 1993 Cal. LEXIS 2534 (1993).

3. Insurer Has A Duty To Defend When There Are Any Facts Which Create A Potential For Liability Under The Policy

A number of jurisdictions have held that an insurer must defend (in contrast to indemnify) the insured if there is any possibility for liability under the policy. For example, in *Maine Bonding & Casualty Co. v. Douglas Dynamics, Inc.*, 594 A.2d 1079 (Me. 1991), the court held that the provider of a CGL had to defend the insured employer in an action for wrongful discharge where the discharged employee pled emotional distress. The insurance policy covered "bodily injuries" which was defined to include only physical injuries. However, the court found that the plaintiff's emotional distress might, albeit remotely, result in bodily injury. Since there was a possibility that the plaintiff might establish "bodily injury" due to her emotional injury, there was a possibility of liability and the insurance company was compelled to defend the insured employer.

B. Strategies For Enhancing Coverage

1. Most commercial general liability policies exclude coverage because of their definition of "injury," "occurrence," or "damages." However, newer CGL policies do broaden the definition of damages to include such things as "personal injury." Most carriers generally will define "personal injury" to include the coverage for libel, slander, or other disparaging utterances.

2. If you do examine your policies and think that there is a potential that you may be covered, you need to give the insurance carrier notice as soon as possible. Delayed notice creates a number of risks. First, late notice may result in no coverage if not made within the time limits of the policy. Further, even if the occurrence is covered, a carrier may deny coverage if he is not given notice and he can show prejudice from the delay.

3. Endorsements are riders to the agreement that either enlarge or decrease the responsibility of the parties to the agreement. Endorsements can broaden the definition of occurrence to include certain employment causes of action. For example, in *United Pacific Insurance v. McGuire Company*, 229 Cal. App. 3d 1560, 1565 (1991), *reh'g denied*, 1991 Cal. App. LEXIS 707 (1991), *review denied*, 1991 Cal. LEXIS 3880 (1991), the endorsement broadened the definition of occurrence to include "events."

The Court of Appeals held that the "events" definition included wrongful termination claims.

EARLY RETIREMENT INCENTIVE PLANS AFTER THE PASSAGE OF THE OLDER WORKERS BENEFIT PROTECTION ACT

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INTRODUCTION

Congress amended the Age Discrimination in Employment Act (ADEA)[1] in October, 1990 to make most early retirement incentive plans (ERIPs) impermissible despite the great popularity of ERIPs among employees and employers. Known as the Older Workers Benefit Protection Act (OWBPA),[2] the amendments to the ADEA ostensibly were passed to overturn *Public Employee's Retirement System v. Betts,*[3] a Supreme Court decision that did not even involve an early retirement incentive plan. As a result of this legislation, the lower courts face the task of determining what ERIPs are permitted and fashioning guidelines for employers to follow in implementing these early retirement schemes.[4]

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[1] 29 U.S.C. § 621-634

[2] S. 1511, §§ 101 *et seq.*, 101st Cong., 2d Sess. *reprinted in* NEW DEVELOPMENTS (CCH) at 6999-80-6999-86 (October, 1990).

[3] 492 U.S. 158 (1989). The OWBPA states:

> The Congress finds that as a result of the decision of the Supreme Court in *Public Employee's Retirement System of Ohio v. Betts* (citation omitted), legislative action is necessary to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967 (citation omitted), which was to prohibit discrimination against older workers and all employee benefits except when age-base reductions in employee benefit plans are justified by significant cost considerations.

S. 1511, § 101, 101st Cong., 2d Sess. *reprinted in* NEW DEVELOPMENTS (CCH) ¶ 5286 at 6999-80, 6999-81 (October, 1990).

[4] The legislative history condemns ERIPs even as it encourages them. The senate report first states that ERIPs that deny or reduce incentives for older workers "may encourage premature departure from employment by older workers [which] conflicts with the purpose of eliminating age discrimination in employee benefits." S.REP. No. 263 101st Cong., 2d Sess. 27, *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 1533. Yet the senate report also recognizes that ERIPs, by definition, must take age into

This Article addresses the lawfulness under the ADEA, both before and after the enactment of the OWBPA, of ERIPs which reduce benefits with ascending age. It then discusses several types of ERIPs, specifically addressing their range of permissibility and effectiveness under the OWBPA.

THE PERMISSIBILITY OF ERIPS BEFORE PASSAGE OF THE OLDER WORKERS BENEFIT PROTECTION ACT

Prior to the OWBPA amendments to the ADEA, section 4(f)(2) of the ADEA provided that it was not unlawful for an employer ". . . to observe the terms of . . . any bona fide employment benefit plan . . . which is not a subterfuge to evade the purposes of this chapter[.]"[5] Only one regulation issued by the Equal Employment Opportunity Commission (EEOC) expressly mentions "early retirement" stating: "Neither Section 4(f)(2) nor any other provision of the Act makes it unlawful for a plan to permit individuals to elect early retirement at a specified age at their own option."[6]

Thus, pursuant to the EEOC guidelines, early retirement incentive plans continue to be permissible under the ADEA, even with passage of the Older Workers Benefit Protection Act. Moreover, no circuit since the passage of these amendments has addressed the lawfulness of ERIPs in general, nor those which reduce or cut off incentives based on the ascending age of the retiring employee. However, those circuits which addressed the permissibility of ERIPs prior to the passage of the OWBPA ruled with virtual unanimity that the offer of an early retirement incentive, alone, is lawful under the ADEA and actually may be a benefit to older workers rather than a detriment.[7] Only a Second Circuit opinion, handed down prior to the OWBPA, held that retirement under an ERIP creates a prima facie case of age discrimination and the

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account. The report then states, "On the other hand, it is clear that a wide variety of early retirement incentive plans may help employers and workers meet problems arising from the impact of age on employment. . . ." *Id.*

[5] 29 U.S.C. § 623(f)(2)

[6] 29 CFR 1625.9(d). As of October 1, 1991, the EEOC has issued no revised regulations since the passage of the OWBPA in October, 1990.

[7] *See, e.g.*, Coburn v. Pan American Airways, Inc., 711 F.2d 339, 344 (D.C. Cir. 1983) ("early retirement . . . is a humane practice well accepted by both employers and employees . . . it supports not a hint of age discrimination"); Bodnar v. Synpol, Inc., 843 F.2d 190 (5th Cir.), *cert. denied*, 109 S.Ct. 260 (1988); Henn v. National Geographic Society, 819 F.2d 824, 827 (7th Cir. 1987) ("An employee to whom the offer has been extended . . . is the beneficiary of any distinction on the basis of age"); Karlen v. City Colleges of Chicago, 837 F.2d 314, 317 (7th Cir.) *cert. denied* 486 U.S. 1044 (1988) ("Yet the discrimination seems to be in favor of rather than against older employees, by giving them an additional option . . . prized by many older employees"); Patterson v. Independent School Dist. No. 709, 742 F.2d 465, 468-469 (8th Cir. 1984) (The early retirement plan was "intrinsically valid . . . [and] . . . the sliding scale of diminishing benefits is manifestly appropriate").

court subsequently withdrew that decision before publication.[8]

However, few circuits, prior to the enactment of the OWBPA, addressed the lawfulness of ERIPs which reduced or cut off incentive payments based on the employee's ascending age—which is arguably made suspect by the recent amendments. Indeed, the Eighth and Fourth Circuits sanctioned diminishing incentives as the employee ages, at least where the incentive can be characterized as a "wage substitute" for giving up the right to continue working, rather than as a "fringe benefit." In *Patterson v. Independent School Dist. No. 709*,[9] the plan at issue held out the "carrot" of a $10,000 early retirement incentive for employees age 55, but incrementally decreased that amount for each year above age 55.[10] Finding the plan "intrinsically valid", the Eighth Circuit held that it did not discriminate against the plaintiff, who was age 67[11]. The court concluded: "Obviously[,] a man of 67 can not [sic] retire at age 55 and obtain benefits provided for persons of that age. And to affect the purpose of encouraging early retirement, the sliding scale of diminishing benefits is manifestly appropriate."[12]

In *Britt v. DuPont*,[13] the Fourth Circuit held that no age discrimination occurred where pension-eligible employees were required to defer certain pension benefits in order to participate in a voluntary retirement plan which included generous severance pay.[14] The employer imposed no similar conditions on employees too young to qualify for pensions who chose the earlier retirement severance package.[15] The court, however, found no ADEA violation because the severance pay represented a wage substitute, not a fringe benefit, thus "necessitating the deferral of pension benefits in exactly the same way that continuing to work would necessitate deferral."[16]

The *Britt* court noted in passing that *Patterson*[17] followed similar reasoning because, in that case, younger employees gave up "the right to work for longer period of time [and] the sliding scale of diminishing benefits . . . simply reflected the reality that the younger worker deserved more wage-substitute pay than an older worker closer to retirement age."[18]

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[8] *See* Paolillo v. Dresser Industries, Inc., 813 F.2d 583 (2d Cir. 1987) (reported as withdrawn). The Second Circuit later substituted an opinion which presumed that the offer of an early retirement incentive, itself, is valid under the ADEA. *See* Paolillo v. Dresser Industries, Inc., 821 F.2d 81 (2d Cir. 1987).

[9] 742 F.2d 465 (8th Cir. 1984).

[10] *Id.* at 468.

[11] *Id.*

[12] *Id.* at 468-469.

[13] 768 F.2d 593 (4th Cir. 1985).

[14] *Id.* at 594.

[15] *Id.* at 594-595.

[16] *Id.* at 595.

[17] 742 F.2d 465, 468 (8th Cir. 1984).

A district court in the Second Circuit, also ruling before the passage of the OWBPA, upheld the legality of terminating ERIP eligibility for employees age 60 and older in order to save costs as long as those employees above the "cut off" age are allowed to participate when the ERIP is first introduced.[19] In *Cipriano v. Bd. of Educ. of North Tonawanda, NY*,[20] the court explained its support of a maximum age limit for ERIP participation as follows:

> From an employer's standpoint, the very purpose of offering an early retirement incentive is to afford the employer the opportunity to effect potentially substantial payroll savings without inequitably altering its employment relationship with its workers . . . . At the same time, such incentives undeniably provide a desirable additional option for the employee [.] . . . Furthermore, absent a maximum age limit (here, age 60), the incentive aspect of any such plan would be largely, if not entirely, negated since all employees would ostensibly become eligible for the plan's benefits upon reaching the triggering age.[21]

The court in *Cipriano* concluded that, without an age ceiling for participation in an ERIP, neither an incentive for the employee to retire early nor an incentive for the employer to offer the opportunity would exist.[22]

Contrary to the analysis found in *Patterson, Britt* and *Cipriano*, the Seventh Circuit concluded—in a case decided before the enactment of the Older Workers Benefit Protection Act--that an ADEA violation occurred where retirees received a reduced incentive amount based on ascending age. In *Karlen v. City College of Chicago*,[23] the plan at issue reduced accumulated sick leave pay and terminated group life insurance for employees who chose to retire after age 64.[24] The Seventh Circuit reversed the trial court's summary judgment in favor of the employer, stating:

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[18] *Britt*, 768 F.2d at 595 n.4.

[19] Cipriano v. Bd. of Educ. of North Tonawanda, NY, 700 F.Supp. 1199, 1209-1211 (W.D.N.Y. 1988).

[20] *Id.*

[21] *Id.* at 1209. However, the court did rule that the plan was not "truly voluntary," as required by the ADEA, for those employees above the cut-off age, stating that "the only basis for denying plaintiffs' participation in the incentive plan was the fact that plaintiffs were over age 60 and 'would be retiring anyway'." *Id.* at 1211.

[22] *Id.* at 1209. The *Cipriano* opinion noted that in *Patterson*, discussed earlier, all the employees age 55 and over had an opportunity to participate in the early retirement plan, regardless of whether the incentive amount diminished with ascending age. However, the *Cipriano* court did not pass on the lawfulness of reducing, rather than cutting off, benefits as an employee ages. *Cipriano*, 700 F.Supp. at 1212.

[23] 837 F.2d 314 (7th Cir.), *cert denied*, 486 U.S. 1044, (1988).

[24] *Id.* at 316.

> To withhold benefits from older persons, in order to induce them to retire seems precisely the form of discrimination at which the Age Discrimination in Employment Act is aimed. . . . [t]he Colleges want to induce workers to retire by age 65. In effect they have two early retirement programs; a munificent one for workers 55 to 64 and a chintzy one for workers 65 to 69.[25]

Congress, while ostensibly passing the OWBPA to overturn *Betts*[26], relied in part on *Karlen* in amending the ADEA's language on the permissibility of early retirement incentive plans.[27]

The Betts Decision

Over two years ago, the Supreme Court held in *Public Employee's Retirement System of Ohio v. Betts*,[28] that a retirement plan adopted before Congress passed the ADEA could not be a "subterfuge"[29] to evade the purposes of the Act and therefore was not in violation of the ADEA.[30] The court further held that a post-ADEA retirement plan could not be a "subterfuge" for discrimination unless it is "a method of discriminating in other common nonfringe-benefit aspects of the employment relationship. . . ."[31]

Ironically, despite the fact that Congress reacted to *Betts* by amending the ADEA language on early retirement incentive plans[32], *Betts* did not involve an ERIP. In *Betts* the state agency which hired the plaintiff in 1978 provided retirement benefits for her and all other state employees under a plan adopted in 1933.[33] The plan provided benefits for all retiring employees based on certain age and service requirements[34] and for employees under age 60 retiring with a disability.[35] Plaintiffs retired in 1985 because of a disability, but was ineligible for the additional disability payment because she was already 61 years old.[36]

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[25] *Id.* at 320.

[26] *See* S. 1511, § 101, 101st Cong., 2d Sess. *reprinted in* NEW DEVELOPMENTS (CCH) ¶ 5286 at pp. 6999-80, 6999-81 (October, 1990); S.REP. No. 263, 101st Cong., 2d Sess. *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 1519-1520.

[27] S.REP. No. 263, 101st Cong., 2d Sess. *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS, 1517, 1533.

[28] 492 U.S. 158 (1989).

[29] Section 4(f)(2), prior to the enactment of the OWBPA amendments, permitted an employee benefit plan which was not a "subterfuge to evade the purposes of this chapter. . . ." 29 U.S.C. § 623(f)(2). The Supreme Court defined "subterfuge" as "[a] scheme, plan, strategem or artifice or evasion." United Airlines v. McMann, 434 U.S. 192, 194 (1977). The EEOC has not issued revised regulations since the passage of the OWBPA.

[30] *Betts,* 109 S. Ct. at 2866.

[31] *Id.*

[32] *See supra* note 26.

[33] *Betts,* 109 S. Ct. at 2858.

[34] *Id.* The age and service based benefits were paid to those employees retiring over age 59 with at least five years of service, those employees age 55 to 59 with at least 25 years of service, or those employees of any age with at least 30 years of service. *Id.*

Betts sued her employer under the ADEA, challenging the retirement and disability scheme as discriminatory on its face.[37] The Supreme Court reversed an appellate court decision affirming the trial court judgment in favor of plaintiff, holding that the state's retirement plan was not a "subterfuge" for age discrimination and that the plaintiff had failed to prove that the age-based disability provision provided a means for discriminating in a nonfringe-benefit area.[38] Congress immediately overturned the *Betts* decision by passing the OWBPA.[39]

THE IMPACT OF THE OWBPA ON THE LAWFULNESS OF EARLY RETIREMENT INCENTIVE PLANS

In passing the OWBPA in 1990, Congress made a finding that, as a result of the holding in *Betts*, an amendment to the ADEA was essential to restore original congressional intent in enacting the Act in 1967.[40] Congress reworded and expanded section 4(f)(2) of the ADEA[41] to provide:

> It shall not be unlawful for an employer, employment agency or labor organization—
>
> . . .
>
> (B) to observe the terms of a bona fide employment benefit plan —
> (i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker . . .; or
> (ii) that is a voluntary retirement incentive plan consistent with the relevant purpose or purposes of this Act.[42]

The OWBPA also makes clear that the employer, not the employee, bears the burden of proving the lawfulness of an early retirement scheme.[43]

Gone from this amended section is the language regarding a "subterfuge" for age discrimination.[44] The new language apparently makes illegal an age ceiling on, for example, disability payments, such as the ceiling found in *Betts*, unless justified by significant cost considerations.[45] The revised language also expressly provides that an early retirement incentive plan, itself, must be consistent with the purposes of the ADEA.[46] However, another revision provides that it is not a violation of the ADEA merely because an employee benefits plan "provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits. . . ."[47]

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[35] *Id.*

[36] *Id.* at 2859.

[37] *Id.*

[38] *Id.* at 2868.

[39] *See* S.REP. NO. 263, 101st Cong., 2d Sess. *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 1519-1520; S. 1511, § 101, 101st Cong., 2d Sess. *reprinted in* NEW DEVELOPMENTS (CCH) ¶ 5286 6999-81-6999-82 (October, 1990).

[40] S. 1511, § 101, 101st Cong., 2d Sess. *reprinted in* NEW DEVELOPMENTS (CCH) ¶ 5286 at 6999-80-6999-81 (October, 1990).

[41] 29 U.S.C. § 623(f)(2).

[42] S. 1511, § 103, 101st Cong., 2d Sess. *reprinted in* NEW DEVELOPMENTS (CCH) ¶ 5286 at 6999-81 (October, 1990).

[43] *Id.*, § 4(f)(2)(B)(ii).

The Senate report states that the OWBPA establishes two principal criteria for determining the legality of early retirement incentive plans: "First . . . [b]ecause early retirement incentive plans, by definition, target older workers . . . [e]mployees eligible for these programs must be given sufficient time to consider their options[.]"[48] Threat of an imminent layoff, for example, could render the employee's retirement involuntary and thus discriminatory.[49] Second, an early retirement plan must further the purposes of the ADEA: to prohibit age discrimination and to resolve issues arising from the impact of age on employment.[50]

The OWBPA, then, does not render early retirement incentive plans unlawful, per se. However, as the legislative history makes clear, the amendments make a wide variety of plans impermissible. The Senate report specifically warns:

> Early retirement incentive plans that deny or reduce benefits to older workers while continuing to make them available to younger workers

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[44] *Id.* Prior to the OWBPA, the relevant language of section 4(f)(2) (29 U.S.C. § 623(f)(2) (1978) provided that it was not unlawful for an employer ". . . to observe the terms of any bona fide . . . employee benefit plan . . . which is not a subterfuge to evade the purposes of this chapter[.]"

[45] *Id.* at § 101. The legislative history of the amendment states that Congress eliminated the word "subterfuge" to "make clear" that

> the *only* justification for age discrimination in an employee benefit is the increased cost in providing the particular benefit to older individuals. . . . Thus, for example, an employer providing long-term disability coverage to all employees may avoid any increases in the cost of providing equal coverage to older employees either by reducing the level of benefits provided to older employees *or* by reducing the duration of benefits available to employees who become disabled at older ages. . . . If [such discrimination is] supported by the necessary cost data.

S.REP. NO. 263, 101st Cong. 2d Sess. *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 1523-1524. (emphasis original).

[46] S. 1511, § 103, 101st Cong., 2d Sess. *reprinted in* NEW DEVELOPMENTS (CCH) ¶ 5286 at 6999-81 (October, 1990).

[47] *Id.* § 103.

[48] S.REP. NO. 263, 101st Cong., 2d Sess. *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 1532.

[49] *Id.*

[50] *Id.* at 1533.

> may encourage premature departure from employment by older workers. This not only conflicts with the purpose of eliminating age discrimination in employee benefits; it also frustrates (rather than promotes) the employment of older persons.[51]

Thus, a plan which reduces or eliminates the early retirement incentive as the employee ages arguably is now a violation of the ADEA.[52]

The Senate report did list several types of early retirement incentive plans that will not violate the ADEA. For example, plans providing flat dollar amount bonuses, service-based benefits, and salary percentage incentives remain lawful under the OWBPA, as long as the plans are truly voluntarily.[53] The OWBPA permits employees to "establish a time-related 'window' program under which [all] employees are offered a special incentive . . . as a means of voluntary work force reduction."[54] Realistically, however, employees offered such an "incentive" would have little motivation to retire earlier than otherwise planned. Moreover, employers would not be motivated to offer an incentive which is in effect a bonus.[55] Employers, then, must study a range of ERIPs, including their effectiveness and risk, before implementing a particular plan or dropping ERIPs altogether.

The OWBPA does not apply to those benefits established prior to the Act's effective date of October 16, 1990[56] and "that continue after the effective date pursuant to the arrangement that was in effect on the effective date," except that any changes in such benefits made after the date of enactment must be in compliance with the OWBPA.[57]

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[51] *Id.*

[52] However, the Senate report relied in part on *Cipriano v. Bd. of Educ. of North Tonawanda, N.Y.*, a case which held, *prior* to the OWBPA, that a maximum age limit in an ERIP is permissible under some circumstances. *See Cipriano*, 700 F.Supp. at 1209-1211.

[53] S.Rep. No. 263, 101st Cong. 2d Sess. *reprinted in* 1990 U.S. Code Cong. & Admin. News 1532-1533.

[54] *Id.* at 1534.

[55] *See* Cipriano v. Board of Education of North Tonawanda, New York, 700 F.Supp. 1199, 1209 ("[A]bsent a maximum age limit . . . the 'incentive' would be transformed into a 'bonus', resulting in a new employment-related cost to the employer without any concomitant benefit").

[56] Section 105(a)(1), (2) of the OWBPA, entitled "Effective Date", provides that the amendment applies "to any employee benefit established or modified on or after the date of enactment of this Act; and . . . other conduct occurring more than 180 days after the date of enactment of this Act." S. 1511, § 105, 101st Cong., 2d Sess. *reprinted in* New Developments (CCH) ¶ 5286 at 6999-82 (October, 1990). Because the law was approved on October 16, 1990, current plans should have been brought into compliance by April 14, 1991, a date 180 days after the date of enactment. However, with respect to those political subdivisions whose plans may be modified only through a change in applicable state or local law, the amendment to the ADEA does not apply until two years after the date of enactment. *See id.* at 6999-83.

[57] *Id.*

EARLY RETIREMENT INCENTIVE PLANS: ANALYSIS AND RECOMMENDATIONS UNDER THE OWBPA

A. Temporary or Window of Opportunity ERIP

A temporary or window of opportunity ERIP is one which terminates as to all eligible employees at the same time. Eligibility is defined by minimum age and/or service requirements. There are no maximum eligibility standards. Such plans can be varied in terms of the eligibility requirements, the duration of the plan, the mechanics of election and the benefits offered.

Eligibility

Any minimum age or service requirements are permissible. Minimum eligibility should be set to coincide with employees' ability to draw a pension under an employer's pension plan. Employees who cannot draw a pension are not likely to elect early retirement. It is also advisable to require some minimum years of service with the employer. Minimum eligibility requirements can be based on age, years of service or a combination of both.

With a temporary plan, it is important to have a defined "date of determination" for eligibility. For example, eligible employees could be defined as all those who attain thirty years under the pension plan or have ten consecutive or fifteen cumulative years with the employer on or before a certain date set in the ERIP. The employer should determine for itself which employees are eligible and notify them accordingly.[58]

There will always be employees who "just miss" eligibility based on factors other than age. The employer should avoid the temptation of allowing such employees to participate. Allowing borderline ineligible employees to participate only moves the line and creates a new group of borderline ineligible employees. The line should be drawn in the first instance to encompass the target group.

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[58] This Article does not address ERIPs which are part of a collective bargaining agreement. However, the OWBPA provides:

> . . . (b) COLLECTIVELY BARGAINED AGREEMENTS—With respect to any employee benefits provides in accordance with a collective bargaining agreement—
>
> . . . any provision of which was entered into by a labor organization . . . and (4) that contains any provision that would be superseded (in whole or in part) by this title and the amendments made by this title, but for the operation of this section, this title and the amendments made by this title shall not apply until the termination of such collective bargaining agreement or June 1, 1992, whichever occurs first.

S. 1511, § 105, 101st Cong., 2d Sess. *reprinted in* NEW DEVELOPMENTS (CCH) ¶ 5286 at 6999-82-6999-83 (October, 1990).

Duration and Election

Duration encompasses several aspects of the temporary ERIP. First, there is the deadline for making an election. Second, there is the actual timing of retirement. Third, there is the eligibility cutoff date.

Most employers want to know well in advance whether an employee will be electing early retirement. A typical procedure is for the employee to elect prior to the start of his final year. The employer and employee may then enter into a "final contract" encompassing the ERIP bonus. The election deadline should also be set so as to provide employees with as much time as possible to consider their options.[59]

A simple temporary ERIP might be as follows: The plan is announced July 1, 1992. Any employee who attains or has attained minimum eligibility on or before July 1, 1994 has until July 1, 1992 to notify the employer that the 1993-94 school year will be his final year. There are a myriad of possible variations.

Eligible employees, as defined above, could have the option of selecting from 1993-94 (or some specified range of subsequent years) as their final year, without changing the election deadline. The eligibility cutoff date could be set at July 1, 1996, and employees given until July 1, 1993 to notify the employer that any year between 1993-94 and 1996-97, occurring after they are eligible, will be their final year.

Risk of Exposure

The legislative history of the OWBPA specifically recognizes temporary or window of opportunity ERIPs (which are not otherwise "involuntary") to be permissible.[60] From the standpoint of risk of exposure, such ERIPs are the only safe harbor. There is no discrimination because the opportunity to participate terminates at the same time for all employees, regardless of age. Employees who fail to meet minimum eligibility requirements have no complaint because it is permissible to favor older employees over younger employees, even if both are within the protected class.

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[59] This example assumes a fiscal year starting on July 1.

[60] The Senate report states:

> In general, early retirement incentive plans may be considered lawful provided they are truly voluntary, are made available for a reasonable period of time, and do not result in arbitrary age discrimination. Thus, for example, it may be permissible for an employer to establish a time-related "window" program under which employees are offered a special incentive for a limited period of time in order to make retirement a more attractive option.

S. REP. No. 263, 101st Cong. 2d Sess. *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS, 1533-1534. *See also* section 201 of the OWBPA on ensuring the voluntariness of an employee's waiver of rights or claims under the ADEA. S. 1511, § 201, 101st Cong., 2d Sess. *reprinted in* NEW DEVELOPMENTS (CCH) ¶ 5286 at 6999-85 (October, 1990).

Effectiveness

Temporary ERIPs provide an incentive to retire "now" rather than "later" because the benefits do terminate. Theoretically, there is no guarantee that there will even be another ERIP, and certainly no set time for one. Unfortunately, the practical reality may be different and employees may be encouraged to "hold out" for the next ERIP. This results from the fact that, if another ERIP does come along, everybody over the minimum will be eligible again.

First, consider the eligible employee who is contemplating her decision pursuant to an existing, temporary ERIP. She knows that this ERIP is going to terminate, but she will again be eligible for sometime within the next eight to twelve years. She may be encouraged to gamble by waiting, particularly if ERIP benefits are computed on the basis of salary at the time of retirement. Employees who just meet the minimum eligibility requirements, particularly those in their early 50s, may be especially inclined to wait.

Consider also an employee who was ineligible for an expired ERIP but who now meets the eligibility requirements. She too believes that there will be another ERIP and that she will be eligible. She may avoid regular retirement and hold out for another ERIP. Similarly, an employee who was eligible for the expired ERIP but did not retire (even if she was not thinking about another ERIP then) may also wait for the next ERIP rather than take regular (non-incentive) retirement.

These perverse incentives can convert temporary ERIPs into a regular retirement bonus.[61] The problem is made worse if the employer, trying to balance the work force, falls into a pattern of regularly implementing temporary ERIPs. This pattern reinforces the belief among employees that they should postpone electing "early retirement" as long as possible.

A succession of temporary ERIPs can also defeat the policy of achieving a balance between experienced and newly educated (and usually younger) employees. Indeed, it can put the employer into a vicious cycle. Older employees who are eligible for retirement will hold out until the employer becomes overloaded with experienced employees. This overload will cause the employer to offer a "temporary" ERIP—resulting in a mass exodus of experienced employees and a subsequent period where there are too many inexperienced employees. Instead of contributing to an orderly turnover, the ERIP creates just the opposite result.

Conclusion

Temporary ERIPs are safe, but they are effective only if the need for an ERIP is truly temporary and if employees have no reason to believe that another ERIP will be implemented in the near future. Reliance on a succession of temporary ERIPs is not an advisable long-term strategy. Nevertheless, there are other considerations which make a temporary ERIP an advisable short-term strategy.

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[61] *See supra* note 55 and accompanying text.

At the present time, the validity of certain permanent plans is uncertain because there is no case law interpreting the OWBPA. This is likely to remain the situation for the next few years. This increases the risk of exposure associated with permanent plans, both in terms of liability and litigation costs. The bottom line is, there is nothing to be gained by being a trend setter. It is better to let someone else bear the risk of liability and incur the cost of litigating the validity of these plans, then read the cases as they come down, and implement a long-term strategy on a more informed basis.

B. Permanent or Long-Term ERIPs

A permanent or long-term ERIP is one of indefinite duration. This does not necessarily mean that employees remain eligible to participate indefinitely, although this is one option. Frequently, the plan provides each employee with her own "window of opportunity" by requiring each employee to elect to participate within a specified time after reaching eligibility. Some plans reduce the ERIP benefit over time leading up to termination of the benefit.

There are, essentially, three options available to an employer contemplating a long-term ERIP. The first option is the "retirement bonus" plan, which does not provide for a reduction or termination of benefits. The second option is the "terminating benefit" plan, which terminates or reduces the benefits on the basis of, for example, age or years of service. The third option is the "bridge" or "actuarial" plan, which attempts to provide early payment of benefits which would be earned if the employee continued to work. As the employee approaches the point at which she would earn the regular benefit, the ERIP benefit diminishes and finally terminates. There are, of course, variations of each of these three options.

1. Retirement Bonus Plans

A retirement bonus plan provides an ERIP benefit to any employee who retires after meeting the minimum eligibility requirements. The only termination of benefits would occur if the plan was repealed.[62] A retirement bonus plan is similar to an indefinite temporary ERIP.

Benefits under such a plan should either be flat rate or, if linked to salary, capped.[63] That is, the benefit should be fixed at the time the employee becomes eligible and should not increase. Although this does not necessarily create an incentive to retire early, it does eliminate some disincentives associated with the prospect of earning a larger bonus by continuing to work. Moreover, retirement bonus plans are very low risk. They should be at least as safe as temporary or window of opportunity plans, perhaps more so.

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[62] In such a case, employees should be given adequate notice of the repeal.

[63] The Senate report expressly states:

Effectiveness

The problem with retirement bonus plans is that they generate minimal incentive to retire early. Even the prospect that the plan will be repealed creates little incentive because employees should be notified in advance of repeal. There are some marginal incentives, however, primarily with respect to employees who are contemplating retirement at a particular financial position. For example, an employee may be contemplating retiring when his pension reaches a certain level which the employee believes is necessary to maintain his life style. The extra ERIP bonus might induce those employees to retire early. As a general matter, the ERIP makes retirement, at any time, "more attractive," and therefore provides incentive.[64]

Even these incentives are limited by the fact that ERIP benefits under a retirement bonus plan will necessarily be lower than under other types of plans. Because there is a potential that "every" employee will receive a bonus, budgetary considerations would likely keep them down.[65] Although such a plan is likely to be popular among employees, it is not likely to be popular with the public.

Conclusion

A retirement bonus plan is really a waste of funds in terms of effectiveness as a true ERIP. It is likely that the level of ERIP benefits needed to achieve significant numbers of early retirement elections

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> [E]arly retirement incentives that provide a flat dollar amount (*e.g.*, $20,000), service based benefits (*e.g.*, $1,000 multiplied by the number of years of service), or a percentage of salary all were permissible before the *Betts* decision and remain lawful under these amendments. Similarly, early retirement incentives that provide flat dollar increases in pension benefits (*e.g.*, $200 per month), percentage increases (*e.g.*, 20%), or that impose years of service and/or age would continue to remain lawful.

S. REP. NO. 263, 101st Cong., 2d Sess. *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 1533.

[64] There is also some incentive to retire early associated with the time value of money. Because the bonus is fixed at eligibility, an employee foregoes the opportunity to earn interest on it by waiting. Unfortunately, this advantage is relatively minimal and may not be obvious to all employees.

[65] Public employees should know that retirement bonus plans might also be susceptible to taxpayer challenge under provisions of the Missouri Constitution prohibiting the "giving away" of public money. *See* MO. CONST. art. VI, § 25.

would exceed the resulting savings. A straight retirement bonus plan therefore is not recommended for most employers.

It is possible, however, to use a variation of such a plan to promote other goals while at the same time achieving some marginal incentive toward early retirement. A sick leave buy-back is a good example. Under such a plan, employees would be compensated for unused sick leave upon retirement. The buy-back should be capped to remove any disincentive associated with earning a higher benefit. The benefit should not terminate or diminish on the basis of age or years of service, but could be subject to reduction if the employee later uses any of the accumulated sick leave.

The availability of this "extra" payment makes retirement more attractive and creates some incentive to retire. The cost is more justifiable because of the savings associated with reducing absenteeism. Such a plan need not even be classified as an ERIP. An employer may wish to explore other instances where it could provide a reward which accumulates and caps at or about retirement age for actions which are beneficial to other employer goals, such as reducing absenteeism. Obviously, the key to this type of early retirement incentive is to "reward" those employees who do "positive" things for the employer (*e.g.*, low absenteeism, voluntary overtime, etc.)

2. Terminating Plans

Under a terminating plan, employees have a fixed time after achieving eligibility in which to elect to participate in the ERIP. After this time their benefit terminates or diminishes toward eventual termination. In either event, there is a point at which each employee loses the opportunity to participate. The election period can vary in terms of its duration. Employees could have one "year of eligibility" or more. There can be more than one election period. For example, eligible employees may be given chances to elect at age 55 and at 30 years of service.

Risk of Exposure

The OWBPA calls plans of this type into question, and makes them susceptible to claims by employees who decline early retirement and later attempt to claim a benefit. This is because the OWBPA, arguably, makes discrimination within the terms of even a "voluntary" ERIP impermissible.[66]

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[66] The Senate report reads: "Early retirement incentive plans that deny or reduce benefits to older workers . . . may encourage premature departure from employment by older workers [which] . . . conflicts with the purpose of eliminating age discrimination in employee benefits." S.REP. No. 263, 101st Cong., 2d Sess. *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 1533.

Risk of exposure has two components, the probability that the employer could be held liable and the probable extent of that liability. Both are relatively high here. Even if the employer were to prevail, the enactment of the OWBPA increases the probability that there will be claims and that, at a minimum, the employer would incur litigation costs in defending the plan. The real risk lies in being held liable.

One successful suit by one employee could open the floodgates to claims by any employee who declined early retirement. Because the claims would be attacked on the terms of the plan itself, the employer could be collaterally estopped from litigating the validity of the plan in subsequent suits. The plan could literally be converted into a "retirement bonus," with higher benefit levels which would be associated with terminating plans.[67] There is also the prospect of paying double damages for willful violations and costs, including plaintiffs' attorneys' fees.[68]

Risk of exposure can be reduced, but by no means eliminated, by using years of service rather than age to determine the reduction/termination dates. From the perspective of the employees as a class, the cutoff would occur at varying ages. Two facts remain, however, which contribute to a substantial level of risk: (1) there is a positive, albeit imprecise, correlation between years of service and age; and (2) from the perspective of employees as individuals, each employee will have a benefit available at one point which is unavailable when the employee is older. Moreover, using years of service only reduces the probability that there would be a successful claim. It does not reduce the magnitude of exposure once one claim succeeds.

There should be no legal difference between a plan which simply terminates and one which diminishes towards termination. In either case, the issue is the criteria used to determine when termination or reduction occurs. If anything, a diminishing plan may be more defensible.

Effectiveness

Terminating plans are effective because they provide a genuine incentive to retire early. Employees who wait lose their ERIP bonus. Such plans can provide for somewhat more lucrative benefits because the cost is justified by the savings resulting from early retirements.

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[67] Generally speaking, one would expect to see higher benefits available under a terminating plan than under a retirement bonus plan because such benefits should only be available to early retirees.

[68] The ADEA permits double damages for willful violations. *See* 29 U.S.C. § 62b.

Conclusion

A terminating ERIP is inadvisable at this time, largely due to the uncertain state after the recent enactment of the OWBPA. Thus, the risk of exposure is too high at this time. Such plans remain, however, the most effective form of ERIP.

The picture should become clearer as courts interpret the OWBPA. This should either reduce the risk of exposure (if terminating plans are held valid) or establish with certainty that they are impermissible. It may also establish some guidelines for developing terminating plans which are permissible, depending upon the grounds relied upon by the courts. It would be unfortunate for an employer to be held liable under a plan which could have been made valid with a few minor adjustments.

3. Bridge or Actuarial Plans

A bridge plan seeks to induce early retirement by providing all or part of a benefit, which the employee would eventually earn, at an earlier point in time. As the employee "earns" the benefit, the ERIP bonus diminishes. An actuarial plan calculates an ERIP benefit on an annual or monthly basis from retirement until death. The benefit is then paid in a present value, lump-sum in accordance with the employee's life expectancy. As an employee continues to work, the ERIP benefit diminishes as the employee's life expectancy shortens.

Risk of Exposure

Plans of this type are riskier than a retirement bonus plan, because the benefits do diminish as the employee gets older. They are less risky than termination plans because there is an objective statistical, albeit age-related, justification for the reduction. There is also some reference in the OWBPA's legislative history which also suggests that bridge plans may be valid.[69] For example, it is permissible, in the context of regular retirement, to provide benefits which terminate or reduce when the employee becomes eligible for social security or Medicare. The rule is that the employee must be no worse off after termination than before. So long as the ERIP bonus was less than the earned benefit, this could be met. Because benefits are computed on a bridge or actuarial basis, it should be possible to limit damage awards even if the plan was deemed discriminatory.

Effectiveness

Such plans also fall between retirement bonuses and termination plans in terms of their effectiveness. The incentive comes from the desire to obtain a benefit without having to work longer to achieve it. Nevertheless, the focus of the plan is to remove disincentives to continuing to work. Unlike a retirement bonus plan, however, the employee does not have the opportunity to do both—earn additional regular benefits and receive the ERIP bonus.

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[69] S. REP. NO. 263, 101st Cong., 2d Sess. *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 1528-1529.

Conclusion

Plans of this type may be the most viable options if terminating plans are held to be invalid under the OWBPA. At this time, however, these plans also involve an unacceptable risk of exposure and should not be implemented until courts have considered the OWBPA. As a practical matter, it would not be possible to develop such a plan quickly.[70]

SUMMARY

The safe approach is to adopt a temporary ERIP and obtain as many early retirements as possible, then to evaluate long-term strategies as decisions on the OWBPA are handed down. In the interim, a "reward paid at retirement" plan could be used to further other goals, while retaining some incentive to retire. This could be continued in addition to other long-term strategies or as a long-term strategy. It might also be advisable to study the possibility of using a bridge or actuarial plan.

If a long-term plan is to be adopted at this time, there are essentially three choices: retirement bonus; bridge/actuarial; and terminating. The bridge/actuarial has, potentially, the best mix of risk and effectiveness, although it would be necessary to "develop" and assess a specific plan. An employer is probably better off with no ERIP than with a retirement bonus plan. At worst, a terminating plan can be "converted" into a retirement bonus. If a terminating plan, which is better than a retirement bonus, is adopted, certain precautions should be taken to reduce risk of exposure. First, reduction or termination of benefits should be based on years of service, not age. All employees who are past eligibility should be given "one chance" to participate. Second, benefits should be as low as possible because the level of benefits provides the measure of damages. Last, there should be no nexus with regular employment benefits (*e.g.*, sick leave), especially in the case of public sector employers, so that an employee cannot claim the depreciation of an entitlement.

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[70] Obviously, the biggest drawback to such plans, even if they are lawful, is their potential complexity. Most of the complexity, however, will be in development, and there should be little problem administering such plans once developed.

NEW RULES FOR OLD AGE

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I. THE OLDER WORKERS BENEFIT PROTECTION ACT ("OWBPA")

A. The OWBPA was enacted on October 16, 1990 to amend the ADEA. It expressly overrules Public Employees Retirement Systems of Ohio v. Betts, 109 S.Ct. 256, 70 Ed.L.Rep. 88 (1989) in order "to restore the original congressional intent in passing and amending the [ADEA], which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." P.L. 101-433, §101. The legislative history can be found primarily in S.Rept. No. 101-263, H. Rept. No. 101-664, and S.1511 Final Substitute: Statement of Managers, Cong. Rec., Oct. 2, 1990, 1990 WL 144430.

1. The OWBPA addresses primarily employee benefit plans, including early retirement incentive plans, severance pay plans and long-term disability plans, rather than age discrimination in other terms and conditions of employment. It reinstates the equal cost or equal benefits rule for employee benefit plans formerly set forth in EEOC regulations and invalidated by Betts. See 29 CFR 1625.10.

2. In addition, the OWBPA adds the following new definition to 29 U.S.C. §630:

> (l) The term "compensation, terms, conditions or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

3. The OWBPA removes the word "subterfuge" from 29 U.S.C. §623(f)(2)(A), which was construed by the Court in Betts; the provision now reads that it is not unlawful "to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act..."

4. Although the OWBPA specified a variety of effective dates, all have passed but the October 16, 1992 deadline applicable to employee benefits provided by states or political

subdivisions, which are not in compliance with the ADEA as amended by the OWBPA, and which may be modified only by a change in state or local law. P.L. 101-433, §105(c).

5. The OWBPA does not apply retroactively to "a series of benefit payments" made to an individual which began prior to the effective date of the OWBPA and continue after that date; however, no substantial modification to the arrangement may be made after the effective date if the intent of the modification is to evade the purposes of the act. P.L. 101-433, §105(e).

B. Proposed EEOC Rules.

On March 27, 1992 the EEOC published requests for comments regarding the ADEA, as amended by the OWBPA. 57 FR 10626-02. Comments are due by July 27, 1992. The EEOC asks for comments on how to interpret most of the provisions of the OWBPA, including the equal cost-equal benefit rule, severance pay plans, early retirement incentive plans, long-term disability, life insurance and health insurance plans, collectively bargained plans, effective date of the statute, and waivers. The following discussion of the provisions of the OWBPA should be read in light of this request for comments, which indicates that there is some uncertainty regarding how to interpret these amendments.

C. Restoration of the Equal Cost or Equal Benefit Principle.

As stated above, Congress intended that the ADEA prohibit discrimination on the basis of age in employee benefits, except when "significant cost considerations" justify age-based reductions in benefits. This is the equal cost or equal benefit principle adopted by the Department of Labor and the EEOC and rejected by the Supreme Court in Betts. In order to reinstate this principle, the OWBPA amends 29 U.S.C. sec. 623(f)(2) to provide that it is not unlawful for an employer:

> (B) to observe the terms of a bona fide employee benefit plan -
> (i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)....

Regulation 1625.10(a)(1) provides that "benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance ... where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage."

1. A cost-based reduction in benefits may be on a "benefit-by-benefit" or a "benefit package" basis. The regulation discusses at length what is meant by the equal cost - equal benefit principle, and how to calculate cost.

2. The question of how to figure cost remains. The Statement of Managers, "Actuarial Practices", notes: "the employer may base necessary cost data on generally accepted actuarial principles, such as actuarial extrapolation, smoothing and averaging ... the employer must base calculations on the best reasonably available data."

3. The exceptions discussed below for early retirement benefits and Social Security bridge payments which are permanent features of defined benefit pension plans, and for severance pay plans do not have to conform to this principle.

D. Voluntary Early Retirement Incentive Plans.

The ADEA now expressly permits bona fide employee benefit plans which are voluntary early retirement plans "consistent with the relevant purpose or purposes" of the ADEA. 29 U.S.C. §623(f)(2)(B)(ii). The employer has the burden of proving the lawfulness of the plan in an enforcement proceeding. Id. The following are guidelines based upon the statute and the legislative history. However, questions remain in interpreting the statute.

1. The plan must be voluntary. It is the employee's burden to prove retirement was involuntary. Relevant factors in determining voluntariness are whether sufficient time has been given to the employee to consider her options; whether accurate and complete information concerning the benefits have been provided to the employee; whether there have been threats, intimidation or coercion. Statement of Managers, supra, "Voluntariness". See, Henn v. National Geographic Society, 819 F.2d 824 (7th Cir. 1987), cert. denied, 484 U.S. 964, 108 S. Ct. 454 (1987) (when one offer makes the recipient better off and the other is the status quo, the offer is beneficial; although the benefits may create a strong incentive to retire, that does not make the choice involuntary). For a more recent case concerning voluntariness of an early retirement incentive and constructive discharge, see Gray v. York Newspapers, 957 F.2d 1070, 58 FEP Cases 191 (3d Cir. 1992).

2. The following aspects of early retirement incentive plans appear to be lawful:

a. minimum age for participation, 29 U.S.C. §623(l)(1);

b. "window periods" (limited time periods for election for participation);

c. incentives which are: flat dollar amounts; service-based benefits (e.g., years of service times a dollar amount per year); a percentage of salary to all employees above a certain age; flat dollar increases in pension benefits (e.g., $100 per month); percentage increases in pension benefits; or incentives which impute increased years of service and/or age. Statement of Managers, supra, "Early Retirement Incentive Plans".

3. Certain aspects of early retirement plans arguably may not be lawful, such as withholding benefits from or decreasing benefits to workers above a certain age while making them available to younger employees, or denying or reducing benefits based on age-related stereotypes (e.g., older employees will be retiring anyway). Such plan features may not be consistent with the relevant purposes of the ADEA.

E. Pension Plans

1. Employee pension benefit plans as defined in ERISA, 29 U.S.C. §1002(2), may provide for a minimum threshold age for eligibility for normal or early retirement benefits. 29 U.S.C. §623(l)(1).

2. An employer may not maintain a pension plan in which an employee's benefit accrual ceases or is reduced because of age (defined benefit plan), or in which allocations to an employee's account cease or are reduced because of age (defined contribution plan). Nevertheless, a plan may impose a limitation on the amount of benefits provided, or may limit the years of service or participation taken into account for determining benefit accrual, if these limitations are not based upon age. 29 U.S.C. §623(j)(1),(2).

3. Section 623(j) has additional provisions which refer to the requirements of ERISA. Anyone preparing or reviewing a pension plan should turn directly to the two statutes.

4. For defined benefit plans, the ADEA now permits subsidies for early retirement benefits, so that employees who retire early receive the same benefit as if they retired later, or Social Security "bridge payments", i.e., subsidies which begin before the age and terminate at the age when participants are eligible to receive Social Security old-age insurance benefits and do not exceed those benefits. 29 U.S.C. §623(l)(1)(B).

F. Long-Term Disability

The OWBPA provides that long-term disability benefits may be reduced by pension benefits other than those attributable to employee contributions, if paid to an individual who "voluntarily elects to receive them" or "for which an individual who has attained the later age of 62 or normal retirement age is eligible". 29 U.S.C. §623(l)(3). There also are special provisions applicable to state and local governments, permitting current employees to choose to retain their present long-term disability coverage even if present coverage does not comply with the ADEA. P.L. 101-433, §105(e).

G. Severance Pay

The OWBPA allows certain deductions from severance payments made as the result of "a contingent event unrelated to age" (e.g., lay-offs, the closing of a division of a university). Deductions from severance pay may be made for the value of any retiree health benefits received by an individual eligible for an immediate pension, and/or "the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension." 29 U.S.C. §623(l)(2)(A). This paragraph of the ADEA also sets forth how to calculate the deductions.

H. Waivers of ADEA Claims.

The OWBPA added detailed requirements for waiving ADEA claims. ADEA waivers must be "knowing and voluntary" to be valid and specific minimum requirements for considering a waiver "knowing and voluntary" are set forth in 29 U.S.C. §626(f). The party asserting the validity of the waiver has "the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary" within the terms of the statute. Id.

1. A waiver must: a) be in writing, and in plain language calculated to be understood by individuals signing it, or the average eligible individual; b) specifically refer to ADEA rights; c) not waive rights or claims arising after the date it is executed; d) be in exchange for consideration beyond what the individual is already entitled to; e) provide written advice to the individual to consult an attorney before executing the agreement; f) afford the individual at least 21 days to consider the agreement (45 days for an "exit incentive or other employment termination program" offered to a group of employees); g) provide for a 7 day period after it is executed, during which it can be revoked by the individual. For waivers in connection with "an exit incentive or other employment termination program offered to a group or class of employees", there is an additional requirement to provide information concerning the eligibility factors for the program, time limits, and the composition of the group or class. There also are specific requirements for waivers filed in settlement of an EEOC charge or a court action.

2. N.B. The OWBPA also provides that no waiver "may affect" the EEOC's responsibilities to enforce the ADEA or be used "to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding" of the EEOC. 29 U.S.C. §626(f)(4).

3. The waiver requirements do not apply to waivers made before the enactment of the OWBPA (October 16, 1990). P.L. 101-433, §202. The Court of Appeals for the Eighth Circuit has held that ordinary contract principles are applicable to waivers of ADEA claims in termination agreements made before the OWBPA went into effect and that it will not modify its past holdings to conform to the "intent" of Congress regarding waiver of ADEA claims, since the OWBPA expressly states that it does not apply to waivers made before the date of its enactment. Ulvin v. Northwestern National Life Insurance Co., 943 F.2d 862, 56 FEP Cases 1328 (8th Cir.1991), cert. denied, 112 S.Ct. 970, 58 FEP Cases 144 (1992). See, also, Forbus v. Sears Roebuck & Co., 958 F.2d 1036, 58 FEP Cases 1019 (11th Cir. 1992) (as a matter of law, ADEA plaintiffs are not required to tender the consideration received for releases as a condition prerequisite to challenging those releases).

II. EFFECT OF CIVIL RIGHTS ACT OF 1991 ON THE ADEA

A. Amends primarily Title VII and 42 U.S.C. §1981; also amends Attorneys Fees Awards Act, ADA and ADEA

B. Timely challenges to seniority systems. Although the Civil Rights Act addresses the effect of Lorance v. AT&T Technologies, 490 U.S. 900, 109 S.Ct. 2261, 49 FEP Cases 1656 (1989) in Title VII cases (sec. 112, amending 42 U.S.C. §2000e-5[e]), it does not amend the ADEA in this regard. Lorance held that the time to challenge a seniority system under Title VII begins to run from the date of its adoption, when it is a facially neutral system adopted for a discriminatory purpose; a facially discriminatory seniority system ("one that treats similarly situated employees differently") "can be challenged at any time." The Seventh Circuit applied both Betts and Lorance to early retirement plans for faculty challenged as discriminatory in violation of the ADEA, and held that Lorance applies to the ADEA and that the time to challenge the retirement plan began to run when it was adopted. EEOC v. City Colleges of Chicago, 944 F.2d 339, 69 Ed.L. Rep. 1054, 56 FEP Cases 1361 (7th Cir. 1991).

However, the OWBPA added the following provision as 29 U.S.C. §623(k): "A seniority system or employee benefit plan shall comply with this Act regardless of the date of adoption of such system or plan."

C. The Civil Rights Act of 1991 amended the ADEA to require the EEOC to notify a person aggrieved when a charge of age discrimination is dismissed or otherwise terminated, and to require that any civil action be filed within 90 days after the receipt of such notice from the EEOC. Section 115, amending 29 U.S.C. §626(e).

D. The provisions for compensatory and punitive damages under Title VII, the ADA and the Rehabilitation Act are not applicable to the ADEA, nor does the amendment to 42 U.S.C. §1988 permit the recovery of experts' fees in an ADEA action.

III. RETROACTIVE APPLICATION OF BETTS

Although the OWBPA was designed to overrule Betts, it was not made retroactive. Therefore, when ruling on cases arising before the relevant effective date of the OWBPA, most courts are holding that the principles set forth in Betts are applicable. Gray v. York Newspapers, Inc., 957 F.2d 1070, 58 FEP Cases 191 (3d Cir. 1992); EEOC v. Westinghouse Electric Corp., 925 F.2d 619, 54 FEP Cases 1659 (3d Cir. 1991); American Ass'n of Retired Persons v. Farmers Group, 943 F.2d 996, 56 FEP Cases 1183 (9th Cir. 1991), cert. denied, 112 S.Ct. 937, 58 FEP Cases 64 (1992); Grossman v. RCA Global Communications, 1991 WL 44837 (S.D.N.Y. March 22, 1991). The following cases concern educational institutions, and the first two have appeared in earlier incarnations in previous NACUA outlines.

1. EEOC v. City Colleges of Chicago, 944 F.2d 339, 69 Ed.L.Rep. 1054, 56 FEP Cases 1361 (7th Cir. 1991). Early retirement plan for faculty which provides lump sum payment for unused sick leave upon retirement, which payment varies as age of retirement increases, and which provides different insurance coverage depending on age of retirement; since, under Betts it did not violate the ADEA to make age-based distinctions in paying fringe benefits, the statute of limitations began to run in 1982 when the plan was adopted and the suit was untimely under Lorance v. AT&T Technologies, 490 U.S. 900 (1989). This case is the "successor" to Karlen v. City Colleges of Chicago, 837 F.2d 314, 44 Ed.L. Rep. 26, 45 FEP Cases 1420 (7th Cir. 1988).

2. Cipriano v. Board of Educ., 772 F.Supp. 1346, 70 Ed.L. Rep. 88 (W.D.N.Y. 1991). See Cipriano v. Board of Educ. of Sch. Dist. of North Tonawanda, 700 F.Supp. 1199 (W.D.N.Y. 1988) on remand from, 785 F.2d 51 (2d Cir. 1986). Teachers' early retirement incentive plan with maximum age limitation, established under a collective bargaining agreement; plaintiffs, who exceeded the age limits but otherwise met the requirements of the plan, alleged the plan as a whole and as applicable to them, violated the ADEA. Betts must be given retroactive effect, despite passage of OWBPA, which is prospective only; plaintiffs cannot show that the early retirement incentive plan at issue intended to serve the purpose of discriminating in any non-fringe benefit aspect of employment; here, plaintiffs complain of not

receiving the benefit of the plan, and cannot show that the plan was an economic disincentive to continued employment.

3. *Bell v. Trustees of Purdue Univ.*, 761 F.Supp. 1360, 55 FEP Cases 1050, 67 Ed.L. Rep. 611 (N.D. Ind. 1991). For period of July 1, 1982-January 1, 1988 University made contributions to TIAA/CREF on behalf of employees only until "normal retirement age," and thereafter ceased contributions, even if participant remained employed. (ADEA was amended effective 1988 to require continued pension contributions and Purdue changed its plan to comply.) Plaintiffs argue that the TIAA/CREF plan is not the type of plan exempted under §4(f)(2); university's contributions are in the nature of basic compensation, not fringe benefits; question of fact as to whether cut-off of contributions was for purpose of discouraging employment of faculty beyond age 65, and was pretext for discrimination. Court holds *Betts* is retroactive and controls the issues presented here. Summary judgment for Purdue is denied; there are facts from which a reasonable jury could infer that the university used "its pension plan as a subterfuge for age based discrimination in wages" (citing *Betts*) to discourage faculty employment after age 65 (the court noted that the pension plan was amended immediately after the 1978 ADEA amendments which raised the mandatory retirement age to 70). The court did not rule on plaintiffs' arguments that the plan was not the type of "plan" contemplated under §4(f)(2), and that Purdue's contributions are in the nature of basic compensation rather than fringe benefits, so §4(f)(2) does not even apply.

4. For a case holding that *Betts* is not retroactive, see *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 52 FEP Cases 374 (10th Cir. 1990), *cert*. *denied*, 111 S.Ct. 252, 54 FEP Cases 1560 (1990). Challenge under ADEA and ERISA to Mobil's change in eligibility for a "lump-sum" option for its retirement plan to increase the dollar amount of threshold eligibility, which change took effect six months after it was announced; plaintiff alleges this change forced him to choose retirement, which was, in effect, a constructive discharge. The Tenth Circuit refused to apply *Betts* retroactively, stating the Supreme Court established a new principle of law when it transformed the affirmative defense of §4(f)(2) into an element of the plaintiff's *prima facie* case, and applying *Betts* in this case would be inequitable because a trial on the merits already had been held, and because defendant never raised §4(f)(2) as an affirmative defense until its reply brief on appeal. Nevertheless, the jury verdict for plaintiff was reversed because Mobil established a business justification for the change in the pension plan, and plaintiff failed to establish pretext. The ERISA claim was dismissed on appeal for lack of standing, because the plaintiff received all his vested benefits and had no reasonable expectation of returning to covered employment.

IV. ARBITRATION OF ADEA CLAIMS

A. In Gilmer v. Interstate/Johnson Lane Corp., 111 S.Ct. 1647, 55 FEP Cases 1116 (1991), the Supreme Court held that a claim under the ADEA can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application. As a condition of his employment, the plaintiff was required to register as a securities representative with the NYSE; the registration application contained a provision that the registrant agreed to arbitrate "any dispute, claim or controversy" with his employer "that is required to be arbitrated under the rules"...of the NYSE. The NYSE rules provided for arbitration of any controversy arising out of employment or the termination of employment. The Court held that this arbitration agreement was enforceable under the Federal Arbitration Act (FAA), 9 U.S.C.§1 et seq.; it so held without reaching the question of whether the FAA even covers employment disputes, stating the issue was not raised below and that the arbitration clause was not contained in a contract of employment. See n.2 and the dissenting opinion. The Court placed the burden on the plaintiff "to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims." The Court held that there was no "inherent inconsistency" between the social policies set forth in the ADEA and enforcing agreements to arbitrate age discrimination claims. Moreover, although an individual subject to an arbitration agreement may not institute a private judicial action, he or she still may file a charge with the EEOC, thus preserving the role of the EEOC in enforcing the ADEA. The Court distinguished Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 7 FEP Cases 81 (1974) on the grounds that it concerned an employee's contractual rights under a collective bargaining agreement as distinct from the employee's statutory Title VII rights, noted a "tension between collective representation and individual statutory rights" not applicable in Gilmer, and stated Gardner-Denver and the cases following it were not decided under the FAA.

B. Gilmer has been extended by the Fifth and Sixth Circuits to require arbitration of Title VII claims of sexual harassment and sexual discrimination, under securities registration agreements similar to the one at issue in Gilmer. Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 57 FEP Cases 386 (6th Cir. 1991); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 56 FEP Cases 1046 (5th Cir. 1991). In Willis, the Sixth Circuit interpreted the FAA to exclude individual employment contracts, as well as collective bargaining agreements, involving employers engaged in interstate commerce (the same employees who would be subject to the ADEA or Title VII), but held that in Gilmer the Supreme Court already had foreclosed construing the arbitration provision in the registration application as part of the contract of employment. The Ninth Circuit, in Mago v. Shearson Lehman Hutton, 956 F.2d 932, 58 FEP Cases 178 (9th Cir. 1992) also has held that Title VII claims are arbitrable, based upon Gilmer, where the employment application contained an agreement to arbitrate employment controversies; the question of whether this was an unenforceable contract of adhesion was remanded to the district court to determine the factual issues (the plaintiff did not contest the applicability of the FAA, but was permitted to do so on remand).

Additional cases are now making their way through the district courts. Bender v. Smith Barney, ___ F.Supp. ___, 58 FEP Cases 1036, 1992 W.L. 71435 (D.N.J. 1992) (motion to compel arbitration granted, based upon agreement to arbitrate in securities registration application; Gilmer extended to Title VII claims); Dancu v. Coopers & Lybrand, 778 F.Supp. 832, 57 FEP Cases 689 (E.D.Pa. 1991) (court compels arbitration of an ADEA claim by a former partner in an accounting firm who was asked to withdraw from the firm; the partnership agreement contained an arbitration provision for any claims or controversies arising out of the agreement or the practices and affairs of the accounting firm; court holds the FAA excludes arbitration of employment contracts only of a class of workers actively involved in interstate transportation, relying upon decisions of First, Second, Third and Sixth Circuits interpreting the FAA in other contexts). See also, Corion Corp. v. Chen, Civ. No. 91-11792-Y, 1991 WL 280288 (D. Mass., Dec. 27, 1991) (individual employment contract to arbitrate termination is enforceable under the FAA, citing a number of circuit decisions pre-Gilmer; civil rights statutes not at issue).

C. The Civil Rights Act of 1991 endorses the use of alternative dispute resolution for statutory civil rights claims, including ADEA claims. Section 118 reads as follows:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

HANDLING EMPLOYEES IN DOWNSIZING

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I. INTRODUCTION

A. Downsizing (here defined as reducing personnel) is often a difficult, complex and unwelcome prospect for colleges and universities, involving financial, academic, legal, employee relations, public relations and political considerations.

B. Generally, there are several levels of decision-making in downsizing: (1) the precipitating financial necessity, which may or may not rise to the level of "financial exigency," (2) the intermediate policy decisions concerning where and how the reductions will be allocated within the institution, (3) the selection process by which employees are selected for termination or retention, and (4) the ultimate decisions to terminate particular employees. Legal considerations both constrain and guide downsizing decision-making at all stages.

C. Numerous labor and other laws are applicable or potentially applicable to downsizing actions, depending on the circumstances. For example, the Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. section 2101, et seq., requires covered employers to give at least 60 days' written notice of "mass layoffs" and "plant closures" to affected employees or their bargaining agent and to state and local agencies.

D. Contract law issues are the initial and often most important legal consideration in any downsizing action. Prior contractual commitments to employees (collective bargaining agreements, faculty tenure policies, individual employment contracts, personnel policy and procedure manual provisions) should be carefully reviewed and followed, unless performance is impossible under the circumstances. For a discussion of faculty contract rights and the AAUP standards, see Houpt, Johnson and Olswang articles in Academic Program Closures: A Legal Compendium (NACUA, 1991).

E. This outline will focus on due process and discrimination issues in downsizing and will suggest a practical approach for minimizing the risk of lawsuits.

II. DUE PROCESS ISSUES

A. Applicability

The Fourteenth Amendment guarantees that "No state...shall deprive any person of life, liberty, or property, without due process of law." Though the nature of the process due varies according to the governmental and private interests involved, the guarantee applies whenever (1) a state actor (2) deprives (3) a person (4) of a protected interest. Texas Faculty Ass'n v. University of Texas at Dallas, 946 F.2d 379 (5th Cir. 1991).

1. The institution involved must be a public institution. While employees at private institutions cannot assert claims under the due process clause, it is useful for private institutions to be aware of the procedural protections required to be afforded to employees (generally faculty members) at public institution. Most private institutions will have provided similar rights to their faculty members by contract, and in any event most institutions will wish to afford the minimum procedural protections required under the due process clause as a matter of policy.

2. The action taken by the public institution must amount to a deprivation. Termination or lay-off is clearly a deprivation. See, e.g., Texas Faculty Ass'n; Johnson v. Board of Regents of Univ. of Wisconsin, 377 F.2d 227 (W.D. Wis. 1974), aff'd without opinion, 510 F.2d 975 (7th Cir. 1975).

3. The employee must be deprived of a protected interest.

   a. Tenured faculty, under state statutes or formal tenure contracts, clearly have a protected property interest in continued employment, invoking the due process clause. See, e.g., Johnson. Faculty who can show de facto tenure also have a protected interest, Perry v. Sindermann, 408 U.S. 593 (1972).

   b. Non-tenured faculty have a protected interest if the termination takes place before the end of their appointment term, Russell v. Harrison, 736 F.2d 283 (5th Cir. 1984); but not if their contracts are not renewed, unless the circumstances of nonrenewal impose a stigma foreclosing other employment opportunities, Board of Regents v. Roth, 408 U.S. 564 (1972).

   c. Administrators and other nonfaculty employees at public institutions may also be entitled to due process protections if they have "legitimate expectations" of continued employment, e.g. under employment contracts.

B. Substantive Due Process

Tenured public employees are protected substantively under the due process clause only from termination for constitutionally impermissible reasons, such as exercise of First Amendment rights or for reasons of race or religion; and from termination which is arbitrary and unreasonable. See, e.g., Johnson.

C. Procedural Due Process

In general, the cases involving terminations of tenured faculty and administrators due to financial reasons affecting the institution have held that the due process clause requires that the individual be given (1) written notice of the reasons for termination and (2) an effective opportunity to rebut those reasons. See, e.g., Russell. The employee is entitled to a fair opportunity to show (1) that the true reason for his or her termination was a constitutionally impermissible reason or (2) that the decision was arbitrary and unreasonable. See, e.g., Johnson.

1. What decisions invoke the procedural safeguards?

a. In Johnson, a case involving terminations of tenured faculty members precipitated by a reduction in state funds to the University of Wisconsin System, the court found no Fourteenth Amendment requirement that tenured faculty members who might ultimately be affected be afforded the opportunity to participate in the decision-making stages prior to the ultimate decision. Only the ultimate decisions selecting specific, named teachers to be laid off, invoked the protections of the due process clause.

b. Recently, in Texas Faculty Ass'n, the Fifth Circuit considered the scope of procedural due process in a program elimination case. The court noted that in most cases in which tenured faculty have been terminated for reasons unrelated to their conduct, such as Johnson, "the event precipitating the need to terminate some faculty members and the decision to terminate particular faculty members are unrelated." In this case, in contrast, the decisions to eliminate the academic programs "had an immediate and deleterious impact on the protected property interests of particular faculty members." Accordingly, the court held that both the program elimination decisions and the termination decisions invoked the due process clause.

2. What process is due?

a. With respect to the program elimination decision in Texas Faculty Ass'n, the court concluded that "only the barest procedural protections of notice and an opportunity to be heard need be afforded the individual faculty member," and that the university had met and exceeded that standard by giving twenty months' notice that the programs were to be phased out and by repeatedly inviting the plaintiffs to meet with their dean, the vice president or the president to discuss the facts considered in reaching the decision.

b. With respect to the termination decision, greater procedural protections are required:

i. Written notice is required, including a "reasonably adequate" (1) statement of the basis for the decision, (2) description of the manner in which the decision had been reached, and (3) disclosure of the information and data upon which the decision-makers had relied. Johnson; Bignall v. North Idaho College, 538 F,2d 243 (1976) (notice by inference and informal discussions inadequate; written notice inadequate where it provided no reason except Board mandate--no reference to financial exigency, decline in student enrollment).

ii. An opportunity to be heard (or to respond) must be provided, but the procedure generally may be very simple. The following have not been required in college and university termination cases:

* a trial-type adversary proceeding

* completely neutral or impartial decision-makers (no due process violation was found where the "hearing" was held before (1) the official responsible for the original decision, Texas Faculty Ass'n, (2) the Board of Trustees which had ordered the faculty cuts, Bignall, or (3) a faculty reconsideration committee which made recommendations to the chancellor, Johnson)

* the right to the presence of counsel

* the right to cross-examine decision-makers or adverse witnesses, as long as reasonably adequate information is provided in the notice to permit the individual to respond meaningfully

However, the employee should be allowed to offer documentary evidence, and the hearing officer should be required to issue written conclusions. Texas Faculty Ass'n.

iii. The scope of the hearing (i.e. what the individual must be allowed a meaningful opportunity to demonstrate) may vary with the particular facts.

* In Johnson, the court indicated that the individual should be permitted to show that reduced student enrollments and fiscal exigency were not in fact precipitating causes for the layoff decisions and to show that the ultimate decision to lay off the individual, rather than another tenured faculty member, was arbitrary and unreasonable.

* In Texas Faculty Ass'n, the court was impressed with the fact that UTD faculty members are tenured to the institution rather than to particular departments. Accordingly, the court described the procedure required as one "... ensuring that (1) an instructor was not terminated for constitutionally impermissible reasons, (2) the administration's actions were taken in good faith, and (3) objective criteria were employed and fairly applied in determining whom, from among the faculty at large, to terminate..."

* In further describing the procedure UTD should have employed, the court noted that the administration probably only needed to consider, in good faith, a written submission from each faculty member as to why he or she deserved to be retained. Only if the written submission makes a colorable showing that the faculty member should have been retained, under the objective criteria used by the institution, must any "hearing" be offered. The "hearing" need only be an opportunity for the faculty member to meet with the decision-maker to present his or her case orally and to explore possible alternatives to termination. If the decision-maker decides not to retain the faculty member (either before or after the "hearing") a written statement of reasons should be given to the faculty member.

iv. The notice and opportunity to be heard need not precede the initial decision to terminate, as long as adequate procedures are available within the institution prior to the actual termination for prompt redress and correction, if necessary. Bignall, Johnson.

III. DISCRIMINATION ISSUES

A. In General

Employees who are terminated or laid off as a result of a reduction in force (RIF) or downsizing frequently claim unlawful discrimination under various federal, state and local laws.

1. Applicable federal anti-discrimination laws include: Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. sec. 2000e, et seq. (race, national origin, sex); the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. sec. 621 et seq., as amended by the Older Workers Benefit Protection Act ("OWBPA") (age); Sections 503 and 504 of the Rehabilitation Act of 1973, 29 U.S.C. 701 et seq. and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. sec. 12101 et seq. (disability). Age discrimination claims have most often been asserted by employees terminated in RIF actions, but other protected class discrimination, especially race and sex, should also be anticipated in college and university downsizing.

2. The Civil Rights Act of 1991 ("CRA") can be expected both to increase the incentives of laid-off employees to sue (because of new rights to compensatory and punitive damages and jury trials) and in some cases to increase their chances of success.

3. Terminated employees may seek to recover under either a disparate treatment or disparate impact theory of liability.

a. Disparate treatment

To recover under a disparate treatment theory, plaintiffs must show that they were intentionally treated less favorably than others because of their age, race, sex or other protected class status. The plaintiff in a RIF case generally establishes a prima facie case of discrimination by showing (a) membership in the protected class; (b) layoff or termination from a job for which he or she was qualified; and (c) that others not in the protected class were treated more favorably. Berndt v. Kaiser Aluminum & Chemical Sales, Inc., 789 F.2d 253 (3rd Cir. 1986). Because the plaintiff in a RIF case is not replaced by another employee, most circuits require the plaintiff to produce direct, circumstantial, or statistical evidence from which an intent to discriminate might reasonably be inferred. See, e.g., Rose v. Wells Fargo, 902 F.2d 1417 (9th Cir. 1990); Barnes v. GenCorp, Inc., 896 F.2d 1457 (6th Cir.), cert. denied, 111 S.Ct. 211 (1990); Oxman v. WLS-TV, 846 F.2d 448 (7th Cir. 1988).

If the plaintiff establishes a prima facie case, the employer then must articulate a legitimate nondiscriminatory business reason for its action. The plaintiff then has the burden (and the opportunity) to try to establish that the asserted reason is a pretext for discrimination. See, e.g., Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

In "mixed motive" cases, the CRA has overturned the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Under the new law, if a Title VII plaintiff demonstrates that discrimination was a motivating factor in the decision, the law is violated even if the defendant was also motivated by legitimate factors. In such a case, a court may grant declaratory and injunctive relief and attorney's fees, but may not award damages or issue an order requiring reinstatement, hiring, promotion or backpay.

b. Disparate impact

This theory is used to challenge facially neutral employment practices which have a discriminatory impact on protected classes; discriminatory motive need not be shown. The CRA has resolved the rules for disparate impact cases as follows:

i. The plaintiff must meet the burdens of production and persuasion by showing that a particular employment practice causes a disparate impact under Title VII. Generally, the plaintiff must demonstrate that each particular challenged employment practice causes a disparate impact; but if the plaintiff demonstrates that the defendant's decision-making process is not capable of separation for analysis, all of the criteria applied in the decision-making process may be analyzed as one employment practice.

ii. If the plaintiff demonstrates that the particular employment practice causes a disparate impact, the employer must demonstrate that the challenged practice is "job related for the position in question and consistent with business necessity."

iii. Even if the employer meets its burden of demonstrating that the challenged practice is job related and consistent with business necessity, the plaintiff may still prevail by showing that another practice or group of practices would serve the employer as well and the employer "refuses to adopt" such an alternative.

B. Making Selection Decisions

1. Involuntary retirement of employees

Requiring employees over a certain age to retire violates the ADEA and is not a permissible option for reducing the workforce except in very limited circumstances:

a. Mandatory retirement is permissible under the ADEA at age 65 or after for employees in bona fide executive or high policy-making positions who are entitled to immediate pensions of at least $44,000. 29 U.S.C. section 631(c)(1).

b. Until December 31, 1993, tenured employees at institutions of higher education may be required to retire at age 70 or after. 29 U.S.C. 631(d).

2. Seniority

a. Selecting employees for layoff or termination in reverse order of seniority has generally been considered a relatively "safe harbor" in avoiding discrimination claims. Both the ADEA and Title VII generally permit an employer to adhere to the terms of a bona fide seniority system, even if the result has an adverse impact on a protected class (generally minorities or women). 29 U.S.C. section 623(f)(2); 42 U.S.C. section 2000e-2(h); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

b. Note, however, that the CRA expands the right of Title VII plaintiffs to challenge seniority systems as intentionally discriminatory, permitting the time for challenges to run from the time when a person is actually injured by the system.

c. In addition, the employer's decision to have a layoff in the first place may not be protected, even if the seniority system is bona fide, if the reduction of employees or work hours can be made through some other method with less or no adverse impact on groups protected by Title VII (generally women and minorities). As an alternative to layoffs, the EEOC recommends a system of "work-sharing" under which the employer reduces the hours of all employees instead of laying off some completely. 45 F.R. 60830 (Sept. 12, 1980); EEOC Compliance Manual, Interp. section 616.26.

3. Relative performance or qualifications

Merit selection on the basis of past, present or anticipated future performance is clearly legitimate in theory, but the focus then turns to the criteria and processes by which relative merit is determined.

a. Decisions based on subjective judgments (e.g. performance appraisals, supervisory ratings) may be challenged under a disparate impact theory, Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988). Under the CRA, if the employee can demonstrate disparate impact, the employer will have a more onerous burden than under prior law of demonstrating that the challenged practice is job-related and consistent with business necessity. Since there are no scientific standards to measure subjective practices, there will doubtless be significant litigation over how an employer can meet its burden. In the meantime, the following lessons from prior case law provide some guidance:

i. Informal, unwritten evaluations have been rejected when offered as justification for terminations adversely affecting protected class members. See, e.g. Harrison v. Lewis, 559 F.Supp. 943 (D.D.C. 1983). Decisions based on previous written performance evaluations and disciplinary reports have been upheld. See, e.g. Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980).

ii. Decisions based on the unguided opinions of supervisors have been found insufficient justification under Title VII and the ADEA. See, e.g. Harrison. If the judgment of a single individual controls, the system may be suspect. Bauer v. Bailar, 647 F.2d 1037 (10th Cir. 1981).

iii. Use of vague, subjective criteria (e.g. "contributions to the mission of the laboratory") which provide evaluators "the opportunity to choose which events to emphasize or omit" are problematic. See, e.g. Fisher v. Proctor & Gamble, 613 F.2d 527 (5th Cir. 1980); Mistretta v. Sandia Corp., 15 FEP 1690 (D.N.M. 1977), aff'd 639 F.2d 588 (10th Cir. 1980).

iv. When subjective factors are used and the evaluators are not members of the plaintiff's protected class, the decision may be particularly scrutinized. Clark v. Tisch, 1991 U.S. DIST LEXIS 15851 (N.D. Ill. 1991).

b. To the extent possible, objective factors should dominate the evaluation. Factors such as quantity and quality of work, educational level, the ability of others to absorb the laid-off employees duties, and the ability of the retained employee to perform in various areas have been upheld. See, e.g. Holt v. Gamewell Corp., 797 F.2d 36 (1st Cir. 1986); Smith v. Flax.

c. "Overqualification" is a risky factor, since it can easily be a pretext for age bias. Taggart v. Time, 55 EPD 40,521 (1991).

d. Work-life expectancy should not be a factor in making layoff decisions, since it is directly tied to age. Long v. Orleans Materials & Equipment, 1989 U.S. Dist LEXIS 12101 (E.D. La. 1989).

4. High salaries; tenure status

Basing layoff decisions on high salaries and/or tenure status is risky, since both are frequently tied to age.

a. Several courts have upheld terminations based on high salary in conjunction with other factors, and there is language in recent cases that choosing higher paid employees for discharge is not in and of itself an act of age discrimination. See, e.g. Holt (eliminating plaintiff's position on basis of high salary and ability of company to absorb his job duties not unlawful); Bay v. Times Mirror Magazines, 56 EPD 40,859 (2d Cir. 1991) (no ADEA violation to discharge older employee because of expressed resistance to restructuring changes and high salary).

b. But in Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983) a selection plan based on tenure and salary was found to violate the ADEA. The case arose out of a program to reduce operating costs, including reducing the number of faculty. The selection plan called for an overall reduction of faculty, with a designated number of the reductions for tenured and nontenured faculty. The college gave two justifications for their selection plan: (1) cost savings (by eliminating some positions for tenured faculty who were generally higher paid than non-tenured), and (2) promoting innovation and quality among the faculty. The court rejected both.

i. With respect to the cost justification, the court noted, "...because of the close relationship between tenure status and age, the plain intent and effect of the defendant's practice was to eliminate older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts."

ii. With respect to the second justification, the court concluded that the defendants had failed to establish that the plan was necessary to achieve this goal, and that it involved "exactly the kind of stereotypical thinking about older workers that the ADEA was designed to eliminate."

d. Using tenure as a factor for retaining faculty (i.e. terminating or not renewing non-tenured faculty before tenured faculty) may have an adverse impact on women or minorities, but most colleges and universities should be able to demonstrate that such a criterion is job related and consistent with business necessity, given the traditional importance of the tenure system. See Zahorik v. Cornell University, 729 F.2d 85 (2d Cir. 1984), quoted with favor by the Supreme Court in Watson ("[The] criteria [used by a university to award tenure], however difficult to apply and however much disagreement they generate in particular cases, are job related . . .").

5. Pension or benefit entitlement

Eligibility or vesting in pension or benefit plans should not be considered in selecting employees for layoff.

a. Selecting employees for layoff by reference to their eligibility for retirement or pensions violates the ADEA. EEOC v. City of New Castle, 32 FEP Cases 1409 (W.D. Pa. 1983), aff'd without op., 740 F.2d 956 (3d Cir. 1984).

b. On the other hand, selecting employees for layoff before they become eligible or before they vest in pension or benefit plans may well violate Section 510 of ERISA, 29 U.S.C. sec. 1140, which prohibits discrimination for the purpose of interfering with any right to which a participant may become entitled under an ERISA plan. See, e.g. Nemeth v. Clark Equipment Co., 677 F.Supp. 899 (W.D. Mich. 1987).

6. Program needs

Where the personnel cuts involve academic programs and faculty, most institutions will want to assure that the faculty retained are those best able to meet the needs of the reduced program. Criteria such as experience and knowledge in the courses to be offered in the reduced program; academic credentials; teaching load; teaching ability; experience or knowledge in other academic areas (ability to double up); and research and scholarly quality and productivity should be considered job-related and consistent with business necessity. Moreover, such considerations are the sort of academic judgments courts will probably still be reluctant to second-guess.

7. Affirmative action; diversity

a. Many colleges and universities will understandably be concerned that the necessary layoffs not undo the progress they have made under affirmative action plans in increasing the representation of minorities and women, particularly in the faculty.

b. Under the "mixed motive" provision of the CRA, the law is violated if a Title VII plaintiff can show that race, sex, etc. was a motivating factor in the decision. Another provision of the CRA provides that "[n]othing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law."

c. The line between permissible and impermissible affirmative action is unclear at best, but any consideration of race or sex in a reduction in force plan is extremely risky. See Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) ("While hiring goals impose a diffuse burden...layoffs impose the entire burden of achieving racial equality on particular individuals.")

i. Wygant involved a collectively-bargained layoff plan, challenged under the constitution, under which teachers with most seniority would be retained, except that at no time would there be a greater percentage of minority teachers laid off than the percentage of minority teachers employed at the time of the layoff. Neither societal discrimination nor the goal of providing "role models" for minority students was considered a sufficiently compelling state interest to justify the race-based layoff plan.

ii. Justice O'Connor's concurring opinion includes an interesting footnote that "The goal of providing 'role models'...should not be confused with the very different goal of promoting racial diversity among the faculty..."

d. Perhaps the best approach for institutions lies in developing selection criteria that avoid race- or sex-consciousness but that are likely to have less of an adverse impact on those protected classes than selections based strictly on seniority or tenure.

C. Closing Schools or Programs

An institution's decision to eliminate programs in order to reduce its workforce is unlikely to be challenged as discriminatory. However, the selection of programs for closure could give rise to claims of discrimination if the programs have large proportions of older (or minority or female) employees.

1. Similar claims have been brought in other contexts. See, e.g. Nemeth (employer found to have discriminated on the basis of age in closing plant for purposes of terminating older workforce).

2. At the University of Iowa, a group called "Women United Against the Cuts" contended that academic programs being considered for reduction or elimination were disproportionately those with larger numbers of female faculty or female students or in "historically female fields." Data presented by the University's Strategic Planning Steering Group indicated that this was not the case, but the protest group raises interesting questions that could, at some point and in some institutions, become the subject of litigation.

IV. GENERAL APPROACH, OBSERVATIONS, AND LESSONS FROM THE TRENCHES

A. Understand the facts.

As Edward Bennett Williams used to say, "There's no substitute for knowing everything." Understand the reasons for the actions the institution is taking, and know the information and data on which the decision-makers relied. Be sure the decisions proceed rationally from the most accurate financial and programmatic information available; but recognize that action often must be taken based on incomplete or partially soft information (e.g. enrollment projections), and that there will always be those who believe that more data and more studies are necessary.

B. Understand how the decisions are made.

Issues of who has decision-making authority and who must or should participate in the decision-making process are often unclear and subject to strong disagreement, especially where academic programs and faculty are affected.

1. Review carefully the terms of institutional bylaws, faculty contracts and tenure policies, and other relevant documents which may deal with decision-making. Become familiar with the processes followed in prior institutional downsizing actions, as well as with the general governance traditions of the institution.

Also become familiar with the AAUP recommendations, whether or not your institution has adopted them--be assured that the faculty will.

2. Recognize that the tradition and ideal of shared governance may be very difficult in practice for a financially troubled institution needing to take downsizing actions, especially when action must be taken quickly. To the extent feasible, involve an appropriate faculty committee in all decision-making that involves educational policy. Where such involvement is determined to be unwise, be prepared explain why.

C. Consider alternatives to involuntary terminations.

For both policy and legal reasons, it is important to explore all realistic alternatives prior to terminating employees. As discussed above, in discrimination cases a layoff decision adversely affecting a protected class may not be justified if an equally effective alternative is available. In a due process challenge, consideration of alternatives is an indication of good faith. And many institutions' faculty tenure policies (as well as the AAUP recommendations) require pursuit of all feasible alternatives before terminating faculty for reasons of financial exigency.

Some examples of alternatives include:

1. Hiring freeze

* Can be put into effect quickly; does not adversely affect existing employees; virtually no legal risks if consistently applied (be sure policy allows for exceptions if essential personnel need to be replaced)

2. Wage freeze

* Again, can be put into effect quickly; minimal adverse impact (at least initially) on employees; minimal legal risks if consistently applied. But limited cost savings; only makes sense as a temporary measure; possibility of losing best employees if applied across-the-board

3. Reduction in retirement or benefit plan contributions

* May be less painful to employees than wage reduction; generally must be applied across-the-board to plan

participants (this can be an advantage or a disadvantage from a policy standpoint). But may require complex plan changes, and in some institutions may raise concerns as great or greater than wage reductions

4. Wage reduction

* May be across-the-board or selective. May involve reduced responsibilities (e.g. eliminating a faculty member's administrative responsibilities). May also involve reduction in work hours, either across-the-board within selective units (e.g. groundskeeping) or selectively

5. Increasing work hours or responsibilities without increasing pay

* e.g. increasing faculty teaching loads or requiring faculty to assume some administrative responsibilities rather than hiring separate administrators.

6. Voluntary resignation incentives

7. Voluntary early retirement incentives

Of course, the alternatives also involve legal, policy, and financial considerations, in some cases more complex than terminations. Careful structuring is required, especially of voluntary resignation and early retirement incentives. But in all cases the incentive of affected employees to sue is vastly reduced because they still have their jobs or have left voluntarily.

D. When involuntary terminations must be made, develop fair criteria and procedures for selecting employees.

Note: When an entire program or function is eliminated, the selection of employees to be terminated may be less of an issue, since all those working in the affected unit will generally be terminated (but see Texas Faculty Ass'n, discussed above). Where positions are eliminated, the selection of employees is also generally a straightforward matter. The following suggestions generally refer to a downsizing where some employees performing similar functions are retained and some are let go.

1. Identify and document the selection criteria. To the extent possible, involve an appropriate faculty body in

identifying criteria for terminating faculty members. Obviously, different criteria may make sense for different jobs--e.g. seniority may make sense for selecting among custodial personnel, while a more complex set of criteria will probably be more appropriate for selecting among faculty members in a given department.

2. Be sure that the criteria themselves are not discriminatory or otherwise impermissible. This may sound obvious, but it isn't always.

3. To the extent possible, use objective criteria, and try to keep away from criteria that reflect adversely on the individuals terminated. Focusing on the legitimate, job-related needs of the employer after the downsizing is generally preferable to focusing on the deficiencies of the employees selected for termination.

4. Consistently apply the selection criteria. If possible, have at least two individuals independently select the employees for termination, based on the criteria. In any event, the reputation for fairness and consistency of the individual(s) charged with selecting employees for termination may well be the single most important determinant in avoiding litigation.

E. Carefully plan how the decisions will be communicated.

1. In general, provide as much notice to affected employees as possible, beyond any statutory or contract requirements. While particular circumstances may make lengthy advance notice impossible or inadvisable, generally the longer the notice the more constructive and successful the transition for everyone involved. Where faculty must be terminated, if at all possible provide notice in advance of the academic "hiring window" period during which the main professional meetings are held.

2. Provide notice first to the affected employees (and their union representatives, if any). Don't let them find out first from reading the newspaper. But shortly thereafter notify remaining employees, the local media, and others as appropriate (e.g. students and alumni, in the case of a program elimination; government officials; affiliated religious organizations, etc.)

3. If possible, be sure affected employees learn the bad news in person, from supervisors, department chairs, or others who are able to handle the situation truthfully and with compassion. Prepare those individuals in advance with answers to

anticipated employee questions, and prepare them for a range of reactions (anger, stunned silence, etc.).

4. Be candid and truthful. Explain the institution's reasons, giving at least a "reasonably adequate" explanation of the financial and institutional justifications for the action. Be sure the notice to employees includes adequate information on how and why the decision was reached so they can have a meaningful opportunity to respond.

5. Be compassionate. Trustees and public relations officers, especially at tuition- and contribution-driven private institutions, may understandably want to explain the decision in positive terms. They will want to describe the action in terms of "streamlining," "doing fewer things better," "rightsizing" and the like. For the terminated employees, such descriptions will almost certainly be seen as insensitive and needlessly cruel. If possible, at least initially, focus instead on the fact that the institution is taking the action reluctantly, and explain that the institution is attempting to mitigate the harmful effects on the employees and others affected.

F. Provide a fair internal procedure which gives employees an opportunity to be heard.

Be prepared for the possibility that existing grievance procedures may not be trusted; if so, consider using an external mediator or some other alternative dispute resolution process.

G. Assist employees in finding other employment and getting on with their lives.

Many institutions either have internal resources or can make arrangements to provide significant assistance to employees who have been or are going to be displaced. Some examples include counseling, outplacement assistance, professional and secretarial help with resume preparation and resume writing, continuation of benefits (particularly tuition benefits), and paying for attendance at the professional meetings at which faculty recruitment takes place. Expect initial bitterness and resistance to such efforts, but keep trying. Appoint the wisest, most genuinely compassionate, and most creative problem-solvers you can to assist employees in the transition period.

Complying with the WARN Act

NANCY E. RYAN

The principal purpose of the Worker Adjustment and Retraining Notification Act (WARN Act) is to provide workers time to adjust to an impending employment loss and to seek alternative employment. The employer's role under the WARN Act is limited to providing notice of an impending employment loss.[1] The Act requires an employer, prior to ordering a plant closing or mass layoff, to provide sixty days advance written notice to the representative of the employees affected by the closing or layoff.[2] In the absence of a representative, the employer must provide notice directly to each affected employee. In addition, the employer must provide sixty days advance notice to the state dislocated-worker unit and to the chief elected official of the local government of the locality where the closing or layoff occurs.

Notwithstanding Congress's attempts to define the terms of the Act and to delimit specifically when an employment decision requires notice, recent WARN Act decisions indicate that many employers (as well as the courts in some instances) are unable to apply the provisions of the Act to specific employment actions. Significantly, the WARN Act litigation indicates that employers are incurring liability as a result of miscalculations of the numbers of their employees. In addition, employers are incurring liability when they rely on a statutory exemption, only to discover subsequently that they were not qualified for the exemption as it is interpreted by the court.

To avoid substantial back pay and attorney's fees liability, then, employers, when considering whether they have a duty to comply with WARN's notice provisions, should pay particular attention to the issues of coverage of the employer and the employment decision involved as well as the availability of exemptions from coverage as the exemptions are currently being interpreted by the courts.

Who Falls under the Act's Coverage?

The WARN Act coverage issues most frequently litigated in the Act's short history focus on whether a business entity is an employer for

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purposes of the Act and, if so, whether the employment decision results in a plant closing or mass layoff as defined by the Act. Although the statute refers to "plant closings" and "mass layoffs," which would seem to implicate traditional manufacturing facilities, the Act defines an "employer" as *any business* that employs one hundred or more employees. The Act applies to investment brokers and automobile manufacturers equally, so long as they employ the requisite number of employees.

When deciding whether the Act applies, the employer must determine whether it employs one hundred or more employees. This analysis may be separated further into two inquiries: (1) identifying the business entity making the decision and (2) determining how many employees the entity employs.

First, the employer or business entity making the employment decision must be identified. When the employing unit has no corporate ties to any other corporation or entity, then the inquiry is easily accomplished. When an employing unit is a subsidiary of a parent corporation, however, the inquiry may be more complicated. For example, a subsidiary corporation contemplating a closing or layoff may employ less than one hundred full-time employees, but the number of employees employed by the parent corporation *in combination* with the employees of the subsidiary may well exceed the one hundred-employee limit. If the subsidiary and parent corporation are considered a single business entity, or the employment decision is made by the parent corporation only to be implemented by the subsidiary, then the subsidiary may be simply a unit of the parent and the *total number* of employees of the parent and the subsidiary will be considered when determining coverage.[3]

Second, once identified, the business entity must determine how many workers it employs. The employer must count not only full-time active employees, but also workers on leave or temporary layoff who have a reasonable expectation of being recalled. With respect to full-time employees, the statutory definition has been interpreted to cover employees "working or performing services regularly for an employer."[4] Although this definition oversimplifies the issue of coverage, it emphasizes that part-time employees are not considered when determining whether a business employs one hundred or more employees.[5] Furthermore, for purposes of determining coverage, an employer must count all full-time employees at all of its facilities, not just the employees at the facility where the closing or layoff is scheduled to take place.

Even after consideration of the full-time employees, an employer may encounter liability if it fails to consider in its calculations workers who are on leave or temporary layoff who have a reasonable expectation of being recalled. The regulations as well as the developing case law provide that a worker has a reasonable expectation of being recalled if the employee understands that employment has been interrupted only temporarily. An employee may gain such understanding either through direct notification by the company or through indirect assumptions based on past industry practice.

For the calculations to accurately reflect the employer's work force, then, the employer should include all employees on layoff who have received notification from the employer that the layoff is only temporary. In addition, the employer should include employees on layoff who, based on past practice of the industry or company, expect, but have not been informed directly, that the layoff is temporary. For example, many industries are cyclical or seasonal in nature. If the past practice of an industry has been to lay off workers for short periods of time every year, then the practice would instill in the employees a reasonable expectation of being recalled when the cycle turns or the season begins. Similarly, when determining whether an employee may reasonably expect to be recalled, the courts have borrowed the five criteria used by the National Labor Relations Board (NLRB), which considers:

1. The past experience of the employer,
2. The employer's future plans,
3. The circumstances of the layoff,
4. Expected length of the layoff, and
5. Industry practice.[6]

Finally, when determining whether an employee has a reasonable expectation of being recalled, the expected or actual duration of the layoff should be considered. In this regard, the regulations and case law focus on whether a layoff is temporary. The term "temporary" has been defined to mean a limited time, and the cases indicate that a time period of one year or less is sufficiently temporary for an employee to maintain a reasonable expectation of being recalled.[7] The determination of whether a layoff is temporary—and thus gives rise to a reasonable expectation of recall—is fact-specific. If including laid-off employees will result in the employment of more than one hundred employees, then the employer should carefully analyze the criteria outlined by the NLRB, resolving reasonable doubts *in favor of the employees' expectations.*

Providing Notice to Employees

If the business entity employs one hundred or more employees, then WARN requires the employer to give advance notice of a plant closing or a mass layoff. The Act defines a plant closing as the shutdown, either permanent or temporary, of a single site or of one or more facilities at a single site, that results in an employment loss during any thirty-day period for fifty or more full-time employees.

Although the Act requires the employer to count all employees at all facilities in determining whether the employer employs more than one hundred employees, the Act defines a plant closing based on the number of employees experiencing an employment loss at a single site. If the employer closes a single site and the closing results in an employment loss at that site for more than fifty employees, then the employer must give the employees advance notice. The employer may avoid WARN's notice requirement, however, if the employer provides the employees at the closed facility with seniority bumping rights at the employer's other facilities.

For example, suppose that an employer with more than one hundred employees nationwide decides to close a single plant which employs sixty employees, but provides for seniority bumping rights to other facilities. If eleven or more employees transfer to another facility by virtue of seniority rights, then less than fifty employees will experience an employment loss at the single site the employer closed. Furthermore, the fact that eleven or more employees at the other facilities experience an employment loss as a result of being bumped is not considered when determining whether a plant closing has occurred, which is limited to the numbers at the site actually closed.

In addition to plant closings, the Act requires an employer to provide advance notice of a mass layoff. A mass layoff is defined as a reduction in force which results in an employment loss at a single site during any thirty-day period for (1) at least 33 percent of the active full-time employees and is equal to at least fifty full-time employees or (2) at least five hundred full-time employees regardless of the percentage of employees affected. With a mass layoff, then, the employing site and the units within that site may continue to operate, but with fewer employees. Notably, the definition of a mass layoff, like that of a plant closing, focuses on whether there is a resulting "employment loss." An employment loss is defined as termination of employment, a layoff in duration of six months or more, or a reduction in work hours of more than 50 percent for a six-month period.[8]

The definition of employment loss creates a difficult task for the employer, especially as it relates to the calculations required to determine whether the employment decision results in a mass layoff. For example, in a recent decision, the district court in the Eastern District of Michigan in *Kildea v. Electro Wire Products, Inc.*, 775 F. Supp. 1014 (E.D. Mich. 1991), originally calculated that the defendant employer failed to include six employees who had been laid off but recalled within thirty days. By adding these 6 employees to the defendant's figures of 47 employees laid off out of a total of 153 employees (which is only 30.7 percent), the court concluded that 53 employees out of a total of 153 employees were laid off, which resulted in more than 50 employees and more than 33 percent (actually 34.6 percent) of the employees incurring an employment loss.

On motion for reconsideration, however, the court reached an altogether different conclusion based on the definition of employment loss. A layoff qualifies as an employment loss if the duration of the layoff *exceeds six months*. The six employees included by the court in its first opinion were recalled within thirty days and thus did not experience an employment loss as defined by the statute. Consequently, the employer laid off forty-seven employees, which does not meet the threshold requirement of fifty or more employees under the definition of a mass layoff.

A similar analysis applies to the situation when the employer decides to lay off five hundred or more employees, but subsequently recalls a certain number of the employees. For example, if the employer lays off five hundred employees, then it would appear that the employer would be liable if it fails to provide the statutorily required notice. If, however, the employer recalls one hundred employees in thirty days, then only four hundred employees have experienced an employment loss. As such, the employer would be liable for failing to provide notice only if four hundred employees is 33 percent or more of the employer's work force. Although the statute provides that the 33-percent threshold is inapplicable when there is a mass layoff of five hundred or more employees, the layoff must qualify as an employment loss for all five hundred employees.

These examples emphasize the difficulties an employer faces when attempting to determine whether to provide notice as required by WARN. Although an employer may anticipate sixty days in advance whether it must terminate employees, the employer may not reasonably anticipate sixty days in advance whether a layoff will last longer than six months. Moreover, an employer may not anticipate sixty days in advance whether an employee will experience a reduction in hours of 50 percent or more for a six-month period. When in doubt, then, many employers may decide to give notice.

Exemptions from Coverage

WARN provides for certain limited circumstances when notice may be given less than sixty days prior to the closing or layoff.[9] First, the *"faltering company" exception* allows an employer to shorten the notice period if, during the period when notice should have been given, the employer was actively seeking capital or business that would have enabled the employer to avoid or postpone a plant closing and thus preclude the necessity of notice.[10] Simply showing that the company sought additional capital is insufficient to establish the faltering company exception. Rather, the company may avoid liability for shortening the notice period only if the capital sought, had it been obtained, would have obviated a plant closing. Thus, an employer that receives the capital but still closes will be liable for the entire notice period because the capital sought did not enable the employer to avoid the closing. Moreover, the employer must show that the capital or business would have been unavailable had the employer given notice.

Second, the *"unforeseeable business circumstances" exception* allows for a shorter notice period when the closing or layoff results from circumstances not reasonably foreseeable at the time notice would have been required. For example, the loss of a major account or contract may result in immediate mass layoffs. If the loss of the account was not reasonably foreseeable, then the employer may avoid liability for a shortened notice period. If, however, the employer had reason to know that the client or customer was planning to cancel the account, then the employer will be liable for not providing the full notice. The difficulty for the employer claiming unforeseeable business circumstances is determining when in the course of its business it should reasonably anticipate that the customer is planning to cancel an account.

Finally, a plant closing or layoff that results from a *"natural disaster"* (that is, flood, earthquake, or drought) may shorten the notice period. The natural disaster exception requires the employer to give notice even if notice occurs after the closing or layoff.

A Practical Checklist

If an employer is considering closing a facility or terminating or laying off employees, then the employer should review a checklist to determine its responsibilities under the Act. The checklist should include:

- Identify the business entity making the employment decision.

- Determine whether the business entity employs one hundred or more employees.
- Determine whether the employment decision involves: (1) a plant closing resulting in an employment loss for fifty or more full-time employees, or (2) a layoff resulting in an employment loss for 33 percent of the full-time employees and equal to at least fifty full-time employees, or five hundred full-time employees regardless of the percentage of employees.
- Determine whether the employer's situation fits one of the statutorily provided exceptions: (1) faltering business seeking capital, (2) unforeseeable circumstances, or (3) a natural disaster.

The prevailing belief among employers is "when in doubt, notify." Such a rule, however, should not be followed without consideration for the economic consequences that may result from providing notice when it is not required. If an employer is likely to suffer greater economic harm by providing notice, then the employer should carefully analyze its obligations under the statute and provide notification only if it is statutorily required. As a counterbalance, however, if an employer fails to provide notice when required, then the employer is liable to the affected employees for back pay and benefits for the period of the violation. In addition, the statute provides for payment of the employees' attorney's fees should they prevail. Similarly, the employer will have its own defense costs to pay. Consequently, in many situations the cost of litigation is likely to exceed the cost to the company of providing advance notice.

Notes

1. Although the Act simply requires notice, some employers voluntarily offer outplacement training to affected employees. Furthermore, employers may provide financial counseling to affected employees to assist in transferring 401(k) funds and obtaining alternative health insurance coverage.

2. The sixty-day requirement under the Act is designed to run concurrently with any notice provisions that may be required by the provisions of a collective bargaining agreement.

3. See *Local 397, International Union of Electronic, Electrical Salaried Machine & Furniture Workers v. Midwest Fasteners, Inc.*, 779 F. Supp. 788 (D.N.J. 1992).

4. *Damron v. Rob Fork Mining Corp.*, 945 F.2d 121, 123 (6th Cir. 1991).

5. If an employer does employ more than one hundred full-time employees and is

contemplating a plant closing or mass layoff as defined by the statute, then part-time employees who may be affected by the employment decision are entitled to receive notice. Thus, an employer should be mindful of part-time employees to the extent that the employment decision may result in an employment loss to the part-time employees.

6. See *Damron* (cited in note 4) at 124.

7. See Id. and cases cited therein.

8. The Act specifically exempts from coverage a closing or layoff that results from the completion of a particular project if the affected employees were hired with the understanding that employment was limited to the duration of the project. In addition, the employer is not required to give advance notice of a closing or layoff resulting from a strike or lockout.

9. Even if one of the exceptions applies, however, the employer must still provide as much notice as reasonably possible.

10. This exception applies only to plant closings.

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